United States Court of Appeals
for the Second Circuit

APPENDIX

ORIGINAL WITH PROOF OF SERVICE

77-6179

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FILED DEC 30 1977
A. DANIEL FUSARO, CLERK

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

EARL P. HOPPER, JR., by his father and next friend, EARL P. HOPPER, SR.; MICHAEL J. BOSILJEVAC, by his wife, next friend and Conservator-Guardian, MARY K. BOSILJEVAC; ROBERT A. BRETT, JR., by his father, next friend and Guardian-Conservator, ROBERT A. BRETT, SR.; NICHOLAS G. BROOKS, by his father and next friend, GEORGE L. BROOKS; SHELDON D. SCHULTZ, by his father, next friend and Trustee (Guardian), GEORGE A. SCHULTZ; DONALD E. SHAY, JR., by his father, next friend and Guardian, DONALD E. SHAY, SR.; JONATHAN B. BEDNAREK, by his father and next friend, JOHN BEDNAREK; VINCENT A. CHIARELLO, by his mother and next friend, ANNE CHIARELLO; JOSEPH PETER FANNING, by his wife and next friend, LINDA FANNING; PAUL O. MEDER, by his wife and next friend, JANE M. MEDER; JOHN F. O'GRADY, by his father and next friend, JOHN M. O'GRADY; LEONARD ROBERTSON, by his father and next friend, STRUAN ROBERTSON; PHILIP CRAIG, by his brother and next friend, JOHN P. CRAIG; BRENT E. DAVIS, by his father and next friend, RUSSELL H. DAVIS, JR.; HARLEY H. HALL, by his wife and next friend, MARY LOUISE HALL; DONALD F. LINDLAND, by his wife and next friend, BARBARA ANN LINDLAND; JAMES M. ROZO, by his father and next friend, SAMUEL ROZO; CHARLES E. SHELTON, by his wife and next friend, DOROTHY M. SHELTON; ROBERT L. STANDERWICK, by his wife and next friend, CAROLYN STANDERWICK; MICHAEL B. VARNADO, by his father, next friend and Curator (Guardian), HOUSLEY VARNADO; and MILTON J. VESCELIUS, by his wife and next friend, JEANENE VESCELIUS,

Plaintiffs-Appellants,

-against-

JAMES E. CARTER, JR., President of the United States; HAROLD S. BROWN, Secretary of Defense; JOHN C. STETSON, Secretary of the Air Force; CLIFFORD L. ALEXANDER, Secretary of the Army; and W. GRAHAM CLAYTOR, JR., Secretary of the Navy,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

JOINT APPENDIX

(Volume II of II - Pages A-465 - A-923)

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

------------------------------x

HOPPER, et al., :

Plaintiffs, :

-against- : 77-C-1793

CARTER, :

Defendant. :

------------------------------x

United States Courthouse
Brooklyn, New York

September 20, 1977
2:00 o'clock p.m.

Before:

HONORABLE JACK B. WEINSTEIN, U.S.D.J.

SHELDON SILVERMAN
OFFICIAL COURT REPORTER

Appearances:

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BY: ELAINE BUCK, ESQ.
Assistant U.S. Attorney

SS/ed
1PM-1

A F T E R N O O N   S E S S I O N

(Time noted: 2:10 p.m.)

THE COURT: I have an application here, Catherine H. Lockhart, who does not wish to be represented here. Is there any objection to removing her from the stay?

MR. FOLEY: Your Honor, I would like to have the letter and the application made a part of the record.

THE COURT: It is.

MR. FOLEY: I do have one question about it; that under normal circumstance would not disturb me, but in this particular case, and because of the history of similar things in the MacDonald case, it strikes me that I should raise it and mention it.

In that letter there's a reference, or a claim that X-party communications were had with the Court. I hope it's inaccurate and I think the record should reflect the truth.

THE COURT: The motion --

MR. FOLEY: Apart from that, I can add one other thing, by the way. Mr. Sharp informed me of the basis of this -- is that this lady intends to get married in the middle of October. I therefore wonder about the necessity of the whole thing. I just feel it doesn't make any great difference to her, and apparently not to us, either, but it's just it strikes me as highly unnecessary.

THE COURT: The application of Catherine H. Lockhart is granted. You may proceed with the adjudication respecting her husband who is missing in action. The United States will inform Donna Sharp of that so she can proceed with whatever personal activities she wishes to.

MR. FOLEY: Your Honor, for the record, may I also confirm whether or not these types of communications are going on with the Court? It just disturbs me.

THE COURT: Everything that comes to my attention is filed and brought to the attention of counsel.

MR. FOLEY: Fine, because I had not heard about this.

THE COURT: It was filed February 19th, docketed, and the Clerk was ordered to give copies to all counsel. If you examine the file you'll fine everything in the file that I've seen.

MR. FOLEY: Very good; thank you, sir.

THE COURT: If the Government will give me the file of Mr. Brooks?

MS. BUCK: I believe that's already in the record as evidence.

THE COURT: Yes, but the file was returned to you.

MS. BUCK: I don't think we took it with us yesterday, no, sir.

MR. FOLEY: I have a file here. Are you referring to Brooks, your Honor?

THE COURT: Yes.

MR. FOLEY: Brooks is here (Indicating).

THE COURT: I've read the other file.

MR. FOLEY: Something came up as we left last night with respect to the Bosiljevac file that you were given. It was observed, the size, sheer thickness of the file we have differs from this and Mrs. Bosiljevac and Mrs. Sullivan thought it would not be hurtful if they sat in the court today and compared theirs with this. I don't think anybody would object to it and if you permit it I'll give it to them.

THE COURT: I'll permit it. It contains a map which is folded. That's why it's thicker. She can look at it if she wishes.

MR. FOLEY: This file is here now, your Honor, I don't know which file this is. We had heard there was some file that had been made available and others that had not. I don't know.

THE COURT: May we continue: Do you have a witness?

CAROL LINDA BATES, called as a witness, having been first duly sworn by the Clerk of the Court, testified as follows:

THE CLERK: Full name and spell it for the record.

THE WITNESS: Carol Linda Bates, B-A-T-E=S.

DIRECT EXAMINATION

BY MR. FOLEY:

Q Ms. Bates, would you state your address for the record?

A 76-51 Tremayne Place, McLean, Virginia.

Q What is your position?

A I'm executive director of the National League of Families of American Prisoners Missing in Southeast Asia.

Q Where is that organization located?

A The organization is located in Washington, D.C.

Q Give the address.

A The address is 1608 K Street, Northwest, Washington, D. C.

Q Is the National League of Families the only POW-MIA related organization that you have been involved with?

A No, it is not.

Q Would you please give your background in this particular field?

A From 1969 until the middle of 1975 I was associated with an organization known as VIVA, Voices in Vital America.

Q Were they involved in the POW-MIA activities?

A Yes, they were, for the years that I was associated with them, they were involved in distributing bracelets with POW-MIA names on them. They distributed literature on bumper stickers, did public awareness programs throughout the nations, literally in other countries.

Q Were you involved in any of those particular programs you mentioned now?

A I was involved in all the particular programs, but I was -- the one originally appeared on the MIA bracelet, I was in charge of all the manufacture and distribution of the bracelets, I was in charge of dealing with the families, getting permission to use their men's names, worked as a liason to the POW-MIA families who were associated with VIVA and the National League of Families. I was involved in writing brochures, producing various articles, television commercials, radio spots, putting on meetings and seminars, traveling, speaking with the Communists, Vietnamese in Paris, and Vietnam an in Laos; many different activities along that line.

Q In the course of your work, both at VIVA and the National League of Families, was it part of your duties to remain in touch with POW-MIA families with respect to problems that arose in their cases?

A Absolutely, yes.

Q In addition to that, was it part of your duty to maintain liason and contact with Government officials in the armed forces and elsewhere in the Executive Branch and legislative branch with respect to POW-MIA situations and problems and affairs?

A That's correct.

Q I would like to show you a document to ask you if you recognize it (Handing)?

A Yes, I do.

Q Can you describe this document --

MR. FOLEY: I then wish to offer it in evidence.

A Yes, this is a script used from a briefing that was given by the Department of Defense to the members of the Woodock Commission prior to their trip to Southeast Asia.

Q Did you obtain this from official sources?

A Yes, I did.

MR. FOLEY: I wish to offer this.

THE COURT: So marked.

THE CLERK: So marked as Plaintiff's Exhibit 26 in evidence.

(So marked.)

Q Do you know when this briefing was given to the Woodcock Commission?

A It was given to them in Hawaii sometime in March of 1977.

Q Were you informed to that effect from official sources?

A Yes, I was.

Q I notice in here that there are some deletions. I would like to turn your attention, in particular, -- these are unnumbered pages, but it seems as though there's a pencil number 4 in the lower right corner of the page and towards the middle of that page there's Navy Lieutenant and then a blank. Was that the form in which you obtained this document?

A Yes, when the document itself came to me there were no names. All the names of the cases in it had been deleted.

Q There were some material, in other words, not included in this when you got it?

A That's correct.

Q I notice just above that there's reference to slide one and slide 1-A and slide 2. Were you given these slides?

A There are copies of the back of this of some slides, but the photographs involved, the actual substance of it, the photographs themselves, are gone.

Q What do you mean, gone?

A They're not part of this.

Q They weren't given to you, you don't know if they have been destroyed or anything, do you?

A No.

Q Were you given any of the background material from which this document was prepared, any of the raw data from which it was?

A No raw data whatsoever.

Q Were you told whether or not the information contained in this document was conveyed by the Woodcock Commission to the Vietnamese on their trip there?

A I was told that it was not conveyed to the Vietnamese.

MR. FOLEY: Your Honor, there has been submitted as an exhibit with an affidavit, a copy of some -- of a report of a congressional committee. If that is at hand, I would like to show it to this witness.

Q Ms. Bates, I would like you to look at this document and ask you do you recognize it?

A Yes, I recognize it.

Q I would ask you to look at it now and tell me, whether, quickly you know if it is an accurate or genuine copy of the document, of the official document?

A No, it is not.

Q Can you state why?

A Yes, there's an insert that should be stapled to the inside front cover that is missing.

Q What does that insert say?

A It indicates Congressman Richard Ottinger would like to be associated with the remarks of Congressman Mokley.

Q What is he --

A He was one of the dissenters.

Q Ottinger was also a dissenter, that's what it said?

A That's correct.

Q Ms. Bates, I would like to show you another document and ask you if you recognize it?

A Yes.

Q Can you state for the record what it is?

A The rules and regulations for the Select Committee on Missing Persons in Southeast Asia.

MS. BUCK: The Government objects to the

relevancy and the manner in which it is presented. I believe these are matters of public record and presented in a brief. What expertise does this particular witness have?

THE COURT: I'll permit it. Go ahead, it is irregular.

MR. FOLEY: Your Honor, I wish to have this document marked as an exhibit.

THE CLERK: Plaintiff's Exhibit 27 marked in evidence.

(So marked.)

Q I wish to show you two more documents and ask you if you recognize them?

A Yes, I do.

MR. FOLEY: I'm giving a copy to the Assistant United States Attorney.

Q Can you identify these documents?

A Yes, one is a letter that was written to Congressman Jim Lloyd, a member of the House Select Committee on MIAs by you and his answer to you.

Q Did I write that, though, as counsel for the National League of Families?

A You wrote it on behalf of us, as our counsel.

Q Do you have the letter?

A The letter is Congressman Lloyd's response to it.

MR. FOLEY: I wish to have these marked as exhibits, if you please, sir.

THE COURT: Mark them in evidence.

THE CLERK: Plaintiff's Exhibit 28 marked in evidence, and Plaintiff's Exhibit 29 marked in evidence.

(So marked.)

MR. FOLEY: If I may have one second because I may skip this section here, I'm seriously thinking.

THE COURT: Very well.

(Pause.)

(Continued on next page.)

DIRECT EXAMINATION

BY MR. FOLEY: (Continued)

Q Ms. Bates, were you present in court yesterday when testimony was given by Mrs. Bosiljevac and Mr. Brooks?

A Yes, I was.

Q In the course of that testimony, do you recall hearing testimony about problems obtaining records from various official sources?

A Yes.

Q In the course of your dealings over the years in this MIA issue with the two organizations you've been associated with, have you encountered that type of a problem in your dealings with MIA families in the past?

A On numerous occasions throughout the years.

Q Is it your opinion, or can you express an opinion as to how frequently that arises in the cases of families that have the ability to pursue their records?

A On a number of occasions over the last 7 years families have called me many times on other items but also mentioned their having problems with their records. They feel things are incomplete, having trouble seeing them; that unless they were to fly to Texas for example, they can't see the record and there are questions and things are left out; these types of conversations have taken place with regularity throughout the years.

Q Do you know a person named May Rose Evans?

A Yes, I do.

Q In what respect do you know her, how do you know her?

A She was a member of the National League of Families. She resided in California, throughout my years involved in this issue, I have come in contact with her on many occasions. Her husband was at one time listed missing in action.

Q Was that resolved, that status change in some way?

A Yes, his status was changed to killed in action.

Q Was that -- withdrawn.

Was he killed in action on the basis of evidence or a presumptive finding of death?

A Some remains or information was forthcoming from Laos.

Q Mrs. Evans -- excuse me, I interrupted you -- Mrs. Evans received the remains of her husband?

A That's my understanding.

MR. FOLEY: That's all, your Honor. I have no further questions of this witness.

(Continued on next page.)

CROSS-EXAMINATION

BY MS. BUCK:

Q You testified you're the executive --

A Director.

Q Are you the next of kin of an individual who is listed as missing in action?

A No, I am not.

Q Are you the next of kin of someone who has been declared killed?

A No, I am not.

Q Ms. Bates, as part of your job, have you ever had an occasion to go to the National League meetings?

A Yes, I have.

Q At those meetings, have you ever had an occasion to see representatives of various services there?

A Yes, I have.

Q Isn't it a fact that those representatives have had files available and have shown those to member of the family?

A Those members --

MR. FOLEY: Objection. I think we should have some indication, does she mean every family or some families? Would she make that question a little more precise?

Q Were members of the service there with files?

A Yes, they were.

Q Was it possible for a family member to see a file if they requested it?

A Those who were able to come to Washington to see the file.

Q Where were these meetings held?

A Almost all were held in Washington, D.C. with one exception.

Q And where was that?

A Omaha, Nebraska.

Q Was there a representative of each service there?

A This is correct.

Q Did they have files with them?

A Yes, they did.

Q Were members of the various families permitted to look at the files regarding their next of kin?

A If they were able to get to wherever the meeting was, if they were present.

MS. BUCK: Thank you.

REDIRECT EXAMINATION

BY MR. FOLEY:

Q Have you any reason to know if those files were complete and accurate?

A I have no reason to know. I know in some cases they were not.

Q I would like to ask you to recall the Omaha meeting in 1974 when there was testimony about that meeting yesterday and Mr. Brooks' experience at it. Are you aware, now, whether or not Mr. Brooks' -- the file that was brought in Mr. Brooks' case was an accurate file?

A I know it was not.

MR. FOLEY: Thank you.

THE COURT: Thank you.

(Witness excused.)

MR. FOLEY: Your Honor, on Friday, of this past week, I received in the late afternoon -- I say that without criticism because we were all very rushed. I received the papers from the defendant's counsel and at about the same time I was seeking to obtain the production of some documents from them and attempted to serve them with subpoenas. Ms. Buck has indicated on the record yesterday, number one, she will have some objections to those subpoenas, and secondly, some of the items on there physically couldn't be produced. At this time I would like to ask for an indication of what is here and from that point on, I can trim my case.

MS. BUCK: I would like to note for the record that's not what I said yesterday. What I said was that we regarded this subpoena as invalid because they hadn't been served on the people in Washington who you demand to be present. We did make an attempt. The subpoenas were served at 5:15 and we did make an attempt to bring whatever we could. We brought the files of various people that you had requested and I have them here. Some were introduced into evidence. I'm not exactly sure what else you requested.

MR. FOLEY: There were two particular ones that I would like to go into now. Mr. Frank Seiverts and in the subpoena addressed to him, I attached a schedule seeing substantial amount of documents. Can these be produced now?

MS. BUCK: I'm sorry, I don't have it. Is it similar to the document of Dr. Shields?

MR. FOLEY: Yes.

MS. BUCK: You can see there are pages.

MR. FOLEY: Are they here?

MS. BUCK: No.

MR. FOLEY: That's okay. I want to find out. I know Mr. Seiverts' were here yesterday.

MS. BUCK: He's no longer a member of the

Defense Department, does not speak to the Defense Department. Any knowledge he has, Mr. Seiverts has.

MR. FOLEY: He is still a Government employee, is he not?

MS. BUCK: I believe we tried to reach him on Friday, not because we felt obligated under the subpoena, but because we wanted to help you out. We were not able to reach him either at his office or at home.

MR. FOLEY: The question is, is he a government employee?

MS. BUCK: Yes.

MR. FOLEY: Therefore subject to somebody's jurisdiction?

MS. BUCK: That's correct.

MR. FOLEY: Your Honor, in light of the fact these documents have not been produced, and to clarify the record, and protect myself and the record, I wish to make certain offers of proof.

Yesterday and -- I wish to do it for the record. Yesterday, you indicated there were certain things you didn't want us to go into and I feel that, for the record, I should cover the point. If I may have another minute, I'll get to them and that will wind me up.

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MR. FOLEY: The first offer of proof which we wish to have contained in the record refers to the testimony that we wished to cover yesterday by Mrs. Sullivan. I would like to describe what we are talking about. We are talking about an argument made in this case that in the event that subsequent to a determination of death it is found that the basis of that determination was wrong, it would be rectified by recision of the determination of death.

The purpose of Mrs. Sullivan's testimony yesterday was to show that in the circumstance letter which she received in 1972, I think it was in '73, describing the reasons why the determination of death occurred, we have evidence to put in that every single evidentiary item shows the basis for that determination of death was wrong and that the Defense Department knows that and has not changed that status. That is the purpose of the testimony.

It would involve --

THE COURT: What's that got to do with somebody ultimately determined dead and being found to be alive?

MR. FOLEY: What we are saying is, my understanding of the Government's testimony was not that the man has to be rescued alive in the future, my

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understanding is if they made an erroneous or unfounded determination of death that they would rescind it.

THE COURT: That is not my interpretation. My interpretation is, if the man is shown to be living he will get everything he would have gotten had he been living all during that peri d and carried missing in action.

MR. FOLEY: In the meantime, I could be misunderstanding this -- do I take it the Government is not making a commitment to change the status of a man as to whom he is not known whether dead or alive or made a mistake in declaring him dead?

THE COURT: That is not before me. If marked killed in action there are various procedures that can be used including the Court of Claims, and there is a procedure for appeal within the department.

MR. FOLEY: We are going to brief that.

THE COURT: You had a chance to brief it. You want to supply a brief, let's have it.

MR. FOLEY: I intend to brief that.

THE COURT: You better be finished when you are finished with your evidence.

MR. FOLEY: During my testimony yesterday we attempted to include evidence of, I believe it was, six different elements of what we would describe as irreparable injury flowing from --

THE COURT: Excuse me.

MR. FOLEY: While this was kept out I wish to point out to the Court there are lists in the supplemental memorandum of law which we filed at the beginning of this trial and although have not been the subject of actual testimony we are prepared to put in testimony --

THE COURT: I will hear whatever you have. Whatever you have I will hear.

MR. FOLEY: I will go on the stand and put it in.

THE COURT: I don't want your testimony. That is argument. I want witnesses or documents. I am not going to have you on the stand again.

MR. FOLEY: May I be heard on that?

THE COURT: No. Let's have the next witness or document, please.

MR. FOLEY: The third item, the third offer of proof, in response to an argument made in the defendant's brief we did wish to put in testimony yesterday as to the role and function of guardians and we are prepared to do that and show that they are required --

THE COURT: I don't want that.

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MR. FOLEY: Those are the offers of proof we were discussing.

Now, one of the most important witnesses I hope to examine today -- may I ask one more thing? We subpoenaed representatives of the four services.

MS. BUCK: They are present.

MR. FOLEY: Do you intend to put them on? If so, I will not --

THE COURT: As I understand there is a motion before me. When you finish all your documents and testimony I'm going to pass on that motion.

MR. FOLEY: Judge, we have a subsequent witness to come in by telephone at some subsequent time.

THE COURT: I will hear all of your witnesses. If you don't have a witness I'm going to close the hearing.

MR. FOLEY: There was a subsequent witness on the telephone. I will call now.

THE COURT: Let's have the witness. If you run out of witnesses the proceeding will be terminated.

You are carrying the ball here.

MR. FOLEY: All right.

THE COURT: I still have a whole courtroom full of officers. If you are going to call them, call them.

5 Don't depend on the Government because you out of Court.

MR. FOLEY: Very well.

(Pause.)

THE COURT: May I have the Armstrong brief? The Woodcock briefing, Plaintiff's Exhibit 26.

MR. FOLEY: YOur Honor, what I would like to do next is -- your Honor, we had a subpoena for a representative --

THE COURT: Excuse me. Do you have a witness or a document? I am not interested in your problems.

MR. FOLEY: I am calling for a witness, a representative of John C. Stetson, the Secretary of the Air Force. I believe there is an officer available.

MS. BUCK: Colonel Gratch.

ARCHIE WILLIAM GRATCH, a witness called herein, was sworn by the Clerk of the Court and testified as follows:

DIRECT EXAMINATION

BY MR. FOLEY:

Q Colonel Gratch, are you involved in the casualty program of the Air Force?

A Yes, sir.

Q Are you in charge of that program?

A Yes, sir.

Q How long have you been involved in the casualty work?

A Approximately 11 years.

Q In course of dealing with any particular casualty, does the time arrive when preparation is made for a status review?

A I'm sorry?

Q Do you get ready for status reviews in the various cases as time goes on?

A Yes.

Q Are there service regulations which govern the manner in which you do this?

A Yes, an Air Force Regulation 3543.

Q Do you happen to have a copy of it with you?

A In my deposition. I don't have it with me.

(Pause.)

MR. FOLEY: May I have this document marked as an exhibit?

THE CLERK: Plaintiff's Exhibit 30 marked in evidence.

MR. FOLEY: That can be identified as the Air Force regulation on status changes.

THE COURT: I've read it.

Q You are, I understand, conversant with this particular set of regulations?

A Yes, sir.

Q Now, who has a right to notice an opportunity to attend a hearing under these regulations?

A All primary next of kin.

Q Do you read it that primary next of kin, this regulation, have a right to attend regardless of whether or not they are receiving Government benefits?

A Yes, sir. That is the intent of the regulation. I think it was supplemented by a letter we sent to the families.

Q We are talking about the regulation now.

Let me show you a copy of it and maybe you will show me what you are talking about in there because I am not sure.

(Pause.)

Q Whenever you are ready.

A As I say, all primary next of kin.

Q Is it in there? Does it say in there?

A I don't see it.

MS. BUCK: Objection.

Q I'm trying to get out the regulatory basis of what you are doing here.

Doesthis cover all or part of the group of people,all primary next of kin?

A It covers all primary next of kin are given a right to hearing under MacDonald --

Q Colonel, please. I am asking you what -- you told me this is the regulation that governs these procedures, is that not true?

A Yes, sir.

Q Are there any other regulations?

A There are other directives. As I said before they were mailed --

MR. FOLEY: May I have the question read again?

Q Are there any other regulations I asked you.

A This is the only published Air Force regulation.

Q Do you function pursuant to regulations? Do they govern what you are supposed to do?

A Yes.

MS. BUCK: Objection.

THE COURT: Overruled.

Q Who issues the regulations that govern the manner in which you conduct a status review?

A Department of Air Force.

Q Under whose authority?

A Chief of Staff.

Q Did the Chief of Staff issue that regulation that you are looking at there or was it published under his authority?

A Under his authority.

Q You say there are no other regulations that govern, is that correct?

A No,but supplemental --

Q Don't but me.

MS. BUCK: Objection.

A This is the only regulation we have that covers it.

Q Are there any other sources of guidance that govern you apart from regulations?

Do you have anything else that controls what you do apart from the service regulations?

A In what regard?

Q You indicated you apparently get some additional -- this document says, notification to next of kin. Next of kin of an MIA member currently receiving Government financial benefits which could be terminated by a status review will be notified that so and so.

It doesn't say anything about next of kin of an MIA when those next of kin are not getting Government benefits.

I'm trying to see where else you look for source of authority.

A As I mentioned in our letter --

Q Do you have a copy of the letter?

A I don't have it with me, no, sir. I believe you brought it up yesterday. You used it in evidence yesterday.

MR. FOLEY: Does anybody know what this is? I'm lost.

THE WITNESS: It's our most recent letter to the families that explained our procedures.

(Pause.)

Q Mr. Bradley has brought something to my attention that maybe helpful.

I would like you to look now at Exhibits 8 and 10 and tell me if either or both of these are the documents you are referring to?

A Yes.

Q Which one?

A Both.

Q Both?

A Yes.

Q These are documents from August 16th and August 25th respectively of this year?

A Yes.

Q Prior to August 16th and August 25th of this year, was it then the rule within the Air Force that nobody brought a next of kin receiving Government benefits could receive -- would be entitled to notice and a hearing?

THE COURT: Sustained. Let's move to what we have today.

Q Can you tell me when you permit somebody to attend -- you give them notice and permit them to attend a status hearing, what efforts, if any, are made by the Air Force to determine whether or not that person has interests which conflict with or are antagonistic to the MIA themselves who is the subject of the hearing?

A Say the question again?

MR. FOLEY: Read it back.

THE COURT: No. Rephrase it.

MR. FOLEY: Your Honor, I'm not sure the witness didn't understand it. Maybe it would be better if it were read back.

THE COURT: All right.

(Whereupon the last question was read by the reporter.)

A First determine if the next of kin, and we go by the record of the emergency data who the member has asked to be notified, asked to receive benefits, and from that point on we would notify the primary next of kin concerned.

MR. FOLEY: Maybe the question should have been rephrased.

Q At the time you have the status review hearing, a certain number of people are entitled to show up?

A Yes, sir.

Q When they show up, that is the hearing or whatever, the proceedings out of which a determination of death can flow --

A Yes?

Q -- at that proceeding, do you know if anybody is representing the MIA, who is the subject of the determination of death --

THE COURT: Don't answer that, it calls for a legal conclusion.

Let me put this hypothetical. Colonel, supposing you are going to hold a hearing and there is a wife receiving benefits; she will be notified?

THE WITNESS: Yes.

THE COURT: Supposing there is a parent who is not receiving benefits, would the parent be notified?

THE WITNESS: If there were no wife.

THE COURT: There is a wife.

THE WITNESS: Yes sir. We would notify the parents.

THE COURT: As well as the wife?

THE WITNESS: Yes.

THE COURT: Now you hold a hearing tomorrow at 10:00 o'clock and the wife and parents show up and the wife says well, I thought it over and I looked at your files and I think you are right in changing his status from missing in action to killed in action. And the parent says no, I object to that. Would you listen to the parents?

THE WITNESS: Yes, sir, we would listen. We certainly would as we have throughout the years.

THE COURT: Would you let the parents see the file?

THE WITNESS: We have always done that.

(continued next page)

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THE COURT: I just wanted to get an overall understanding. If the parent had information that the wife didn't want you to receive, would you receive it?

THE WITNESS: Yes, sir.

THE COURT: Okay, you may inquire.

DIRECT EXAMINATION

BY MR. FOLEY (CONTINUING):

Q Let's carry the hypothetical a little further. If you sent out a notice that there is a status review in contemplation and the wife who is receiving Government benefits says she wishes to waive a hearing, and other members of the family do not wish to waive that hearing but wish to have a hearing --

THE COURT: Let's keep it with parents.

Q What happens then, do you waive a hearing or --

A If the wife were receiving governmental benefits and waives the hearing, we notify the family, secondary next of kin. If they are not receiving any financial governmental benefits they would not be allowed a hearing.

THE COURT: She can waive?

THE WITNESS: She can actually waive the hearing if she so desires. But advise the secondary --

THE COURT: If they want to come in you won't hear them?

THE WITNESS: Not unless they are receiving benefits.

THE COURT: Have you had cases like that?

THE WITNESS: Yes, sir.

Q How many determinations of death has your office made since the Paris peace agreement?

A About 243.

Q Out of those, how many of those cases were the hearings waived?

A I have the exact number --

THE COURT: If I may interrupt before you give that figure, I want to follow this to get it clear. Getting back to the hypothetical, the wife says she doesn't want a hearing, she waives. The parent says I want a hearing. But you don't give it?

THE WITNESS: Yes.

THE COURT: Do you still nevertheless go through the file yourself to make an independent determination that it should be changed to killed in action rather than missing in action?

THE WITNESS: Absolutely.

THE COURT: If the file was not such as to lead you to change it, would you change it even though the wife waived?

MR. FOLEY: Can I get that again?

THE COURT: If the wife waived, nevertheless on your examination of the file you felt that it should not be changed to killed in action, would you change it?

THE WITNESS: I wouldn't be the sole person looking at it, a group of officers would be and they make individual judgments.

THE COURT: I understand. If the wife waived and said no hearing, would you still make an independent judgment?

THE WITNESS: Yes.

THE COURT: If you decided it should be continued as an MIA, would you say continue it?

THE WITNESS: Yes.

THE COURT: Even though she waived?

THE WITNESS: Yes, based on the case.

THE COURT: You would make an independent analysis?

THE WITNESS: Yes. That is the way we handle all our cases.

THE COURT: In making this determination, how do you approach it? Do you keep the burden of proof

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Gratch-direct

in favor of MIA or in favor of killed in action, or what?

THE WITNESS: That is a difficult question in that each case is different. We weigh the preponderance of evidence.

THE COURT: Do you use the preponderance of evidence?

THE WITNESS: Yes.

THE COURT: Have you had a law school training?

THE WITNESS: No, sir.

THE COURT: That is a technical phrase and used very properly.

MR. FOLEY: I don't know.

THE COURT: All right.

Q The Judge asked you a question about if the wife waived and you reviewed a file after that and found that you concluded that a status change and determination of death was inappropriate in your mind, that you would turn down that status change and keep him missing in action.

I would like to ask you, has that ever happened?

A Yes.

Q How recently?

A I believe in 1973.

Gratch-direct

Q Since right after the Paris agreement it has not happened?

A Well, are you familiar with the Martin case?

Q The James case?

A Martin and James.

Q Martin didn't waive anything. I am asking about cases where it is waived and subsequently you reviewed it without a hearing and determined that the man would stay in missing status.

A No.

Q That never happened?

A No.

Q Discussing the Martin case -- well, not the Martin case. I think you are trying to tell us how many cases -- how many determinations of death you made since the Paris agreement and how many were in situations where the waiver had come in. You were getting those numbers ready a while ago.

A 247.

Q 247 determinations of death since the Paris agreement?

A Yes.

Q How many of those were cases where a hearing had been waived?

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Gratch-direct

A I don't have that exact figure. I would say approximately 210, 215, something like that.

Q You had full-blown hearings in 35 cases?

A I don't understand what you mean by full-blown.

Q You had hearings. A hearing that was not waived but conducted as hearings, is that correct?

A Yes.

Q About what, 35 cases out of 247?

A Roughly.

THE COURT: That is an unusual situation. There was a freeze on hearings --

MR. FOLEY: Not always. There was a hiatus in there.

THE COURT: It's not typical of what is going to happen.

Q Of the cases in which you had hearings, how many of those cases resulted in a continuance in missing status?

A At the request of having the hearing?

Q After the hearing, during the period we are talking about since the Paris agreement, you had a hearing, 25 or 30 cases?

A All were declared dead.

Q How about Martin and James?

A They were continued in missing status.

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Gratch-direct

Q There are two cases continued in missing status, is that correct?

A Yes.

Q Was the reason for that continuation in missing status because the family found documents in your files in Southeast Asia that were not contained in your file here?

A I don't believe so. I wasn't a member of that -- I didn't participate in that particular hearing.

Q You don't know the reason why Martin and James --

A The officers decided after listening to everybody to continue them.

Q Are you familiar with the files of Martin and James?

A Yes.

Q Do you know what the problem was --

A I concluded that the members --

Q Do you know why it happened? What was the problem that caused them to be kept in missing status?

A They have documents that pertain to the case that weren't there that were later disproven.

Q The documents were discovered?

A Yes, sir.

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Gratch-direct

Q Those documents were found?

A They pertain --

Q Don't worry about --

MS. BUCK: Objection.

Q I am asking you whether the documents were in fact discovered and you said, you indicated they were not in existence and I want to be sure --

A I didn't say they weren't.

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Q Okay. Now, were those documents found in the files, in the Southeast Asia file, but not contained in the alleged duplicate files maintained here?

A Yes.

Q In those two cases, Martin and James -- in those two cases there was a continuance of missing status, right?

A That's correct.

Q It was because of this business about the documents; is that correct?

A I am not sure that that is the reason. I said I wasn't a member of the board.

Q Are they both still in missing status?

A Just Martin.

Q Just Martin?

A Yes.

Q What happened to James?

A She requested the case be reviewed.

Q How long after?

A She felt very strongly that her husband was deceased.

Q How long after you found that because of the -- withdraw that question.

Q How long after this hearing in which it was discovered that there was some problem about missing documents, and whether for that reason or another the guys would continue in -- were continued in missing status? How long after that did you have another proceeding in James and declared him dead on the wife's waiver?

A I would have to check. We have a record of it. I would estimate approximately six to eight months. I'm not sure.

Q You wouldn't estimate about three months?

A I don't know.

Q You wouldn't estimate that it happened frankly immediately, would you?

A No, I wouldn't.

Q No. Now, when you say you have a hearing, describe the hearing. Who conducts the hearing?

A We have the equivalent to a -- well, you're talking now about if we started to review cases and we notify the next of kin that their case is going to be reviewed and they requested a hearing with counsel.

Q Tell me, has it changed over the last two or three years as to who conducts the hearing?

A No. You see, Mr. Foley, what we are trying to do, we are trying to tailor this thing so it will help the families. This is a very delicate matter and --

MR. FOLEY: I wish to have that stricken from the record. It's not even responsive. There's no question that it could possibly relate to.

Could you please go back before that and see what it was that we were talking about.

(Record read.)

Q Now, is there a hearing officer who conducts the hearing?

A Yes, sir.

Q Who is that usually?

A Well, it depends on what the family would like. If they have counsel, we would have our legal officer equivalent to a colonel who would conduct the hearing with a board of officers.

Q Is there any -- how many people are on the board?

A One to three. Generally three.

Q Generally three. And what is this legal officer? Is there any one man that usually does that?

A Well, it would be the -- our legal advisor at Randolph Military Personnel Center.

Q It could be anyone? No one person assigned?

A People get transferred over the years and --

Q Right now. Say, if you were to have a flock of status hearings next month, would it likely be that one man?

A Yes.

Q Who is it?

A I don't know who it is. We haven't appointed one as yet.

Q I see.

A But we would. And we had the hearing.

Q I see. Now -- so there is a Review Board? Can you describe who the other members of the board are? Where are they drawn from?

A They are drawn from the military, from the Air Force.

Q Well --

A Grade of lieutenant colonel through colonel.

Q You just go out at random to the Air Force base and get in a whole block of guys that fly airplanes and things like that, or are they people who are more focused in on these things?

A Well, in the past we have always used people that have had combat experience. Although there is no requirement to do this, we feel it is appropriate.

Q What I am driving at, are they individuals related in any way to the casualty office?

A No. In a case like that, they would not be unless the family -- and we have had this happen -- would come to me and say, we would like to have you review the case.

Q Let's get on to the other ones we were talking about. What training do they have to equip themselves to act as a hearing officer? Are they lawyers?

A No. Just the legal advisor.

Q Are they M.I.A.'s or former M.I.A.'s?

A No, sir. We haven't had any -- I can't say what the future board would consist of.

Q How about the -- are they --

A They are combat people. They have flown tours in Southeast Asia in fighters or possibly transports or being conversant with the operation, military operation in Southeast Asia.

Q You, in fact, today, never had anybody that was in missing status that was on that board, have you?

A Anyone who is in missing --

Q Who was in missing status.

A No, I haven't.

Q Now, this board of the hearing officers, do they decide the question of whether or not a status change will take place?

A The Secretary of the Air Force makes the final decision.

Q I see. What do --

A Makes the recommendation.

Q They make a recommendation. Are there any regulations you can point to -- I will strike that. Strike that question.

Who makes the decision to convene a status review or to conduct one? Prior to sending out the notice or anything, the decision is made at some point that we will have a status review on this man's case. Who makes that decision?

A Well, it would be my boss, General Svensen.

Q He does it on the basis of what?

A On the law.

Q No, no. I mean what is the -- what is the material, what is the consideration that leads him to this decision?

A The man's missing status.

Q Does he get advice from anybody that hears a good case to go on now or anything like that? He's staff, isn't he?

A Yes.

Q You fellows work on the --

A On the staff.

Q And you schedule cases which he confirms should be on; is that correct?

A That's correct.

Q All right. Well then, who is it that actually makes the recommendation to him?

A It would be the reviewing officers, the hearing officers.

Q No, I am talking about the recommendation to him to convene the hearing or the review. His initial decision is made that we will have a case of review on John Jones.

A As you know, we are -- we have been restricted throughout all of these years. The recommendation would be started with the oldest one first. We shoot down and expand this and that's how we would take it. I would -- if you mean, would I line up the cases, yes sir, I would start them out.

Q All right. Then you would start the cases off? Do you have some basis for deciding whether or not a status review should be made?

A Well, I probably would be the hearing officer. I would probably line up members of the staff.

Q What do you line up?

A The oldest cases first.

Q How do you go about lining up the cases?

THE COURT: I don't understand the question. I don't think it helps us at all.

(Continued on next page.)

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MR. FOLEY: I want to see how -- I am going through the mechanics of how this occurs.

THE COURT: I don't want this.

MR. FOLEY: Sir, I respectfully suggest that I really have a reason --

THE COURT: Tell me what the reason is.

MR. FOLEY: The reason pertains to the complaint, paragraph 22 in particular, C. which states that they have no criteria for setting up these things. I want to know how they do it and why.

THE COURT: It doesn't make a bit of difference whether they took it at random or in order or whatever. He says he does it by the last first. That's sufficient. Let's move ahead.

Q Is there any other basis other than the oldest case? Anything other than that?

A Yes.

THE COURT: Do not answer the question. The issue before us is whether there is a hearing. Let's move to that, that question.

Q Subsequent to -- when a hearing takes place, can you identify any regulations which state the criteria on the basis on which a decision should be made?

A There's no regulation based on the case on its individual merits other than the case file.

Q There's no generally applicable --

A No printed regulations other than the guides which are provided in the regulations that you have already seen.

Q And, I take it, that the board should include the -- there are no such things as unprinted regulations; isn't that true? You say no printed regulations? There is no such thing as an unprinted regulation?

A Yes.

Q When you say no printed regulations, you mean no regulations. period.

A That's right. Other than what we are provided.

Q Do you have any role as a casualty officer in the preparation of the case prior to the hearing?

A Yes, sir.

Q What do you do?

A Well, myself personally, I have a bunch of analysts that look at each individual case, using the case file, all the documents there, to put an objective picture -- as we always try to do with the families throughout, find out what actually happened on each individual case and present it objectively as to what really happened to the

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Gratch-direct

individual.

MR. FOLEY: Your Honor, I object to that answer and move to strike it upon the grounds that, one, it is not responsive, and secondly, it is self-serving.

THE COURT: Denied. Let's move ahead, shall we?

Q Now, can you tell me, do you prepare -- you or people working with you, prepare the summary statements we have heard about?

A Yes, sir, we do.

Q At the time that you prepare that statement, is any decision made by anybody that the case is appropriate for a status change?

A No. That is for the people that review the case to make that decision.

Q One moment, please. I would like to show you Exhibit 9 and ask you if that is the type of summary we are talking about.

A With regard to status change?

Q Yes.

A This is a general summary that would -- what would be with the case file?

Q Right.

A That everyone would look at, yes.

Q I am asking you, is this the type of summary that you make up in preparation for a status review hearing or a status review?

A Yes.

Q It is.

Now, I would like you to look at the -- at the last sentence and I want to warn you that this appears to refer to a -- to a prior review. I want it understood that that is so.

A This was referring to the twelve months, end of year review.

Q Right. Now, it says there that at that time there was the finding of the board that an appropriate case for administrative determination of death was made. And now, when you are making up the summaries, do words such as that go in or is there any consideration made of that?

A Well, just as it is in here.

Q I see. Okay. We have heard reference to the preoceedings which are conducted and which may lead to determinations of death as nonadversary. Now, you are acquainted with that description?

A I think so. Yes, sir.

Q Would you tell me what it means to you?

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Gratch-direct

THE COURT: No. You can ask him to describe the hearing. That's all I want.

MR. FOLEY: All right.

Q At a status -- at these proceedings, if a hearing is required requesting an -- strike that question.

Are there instances where a -- where a determination of death is made in cases where in fact there's no evidence, actual evidence as to what happened to the man? No information?

A Well, we have the information based on the case file. If that's what you mean.

Q No.

A Other than that, there is nothing else that happens since the individual went down.

Q I'm talking about cases where somebody went out flying one night and is never seen again. There is no information.

A Yes, sir.

Q Now --

MR. FOLEY: May I have the two freedom of information --

Q Who is responsible for assembling the material maintained in the files?

A My office. The Casualty file.

Q Would you be the individual in charge of that office?

A Well, no. I have a major who is in charge of that office.

Q Now, in the event that there is some question of seeking documents elsewhere, in the Defense Department or in the executive branch of Government, does anybody have the responsibility of seeking out those documents and getting them into the file?

A Yes.

Q Who?

A The major in charge of the --

Q Could you state for us what his security clearance is?

A Top Secret.

Q Is that the top security clearance that you can have?

A There are various security clearances. I don't know if they are considered -- if that's the top security clearance. I am sure there are others above that, but --

Q We have had some testimony here with respect to freedom of information requests that resulted in an indication that at Defense and State there are quantities of what I believe you will recognize as uncorrelated documents. Is that phrase familiar to you?

A I have heard of it, yes.

Q Do you know where they are and what they are?

MS. BUCK: Objection. I don't recall that being established in the testimony.

MR. FOLEY: He says he knows that they are.

THE WITNESS: I didn't say I --

Q You said you are familiar with it.

MR. FOLEY: Let's have what he said. That's the easiest way.

THE COURT: No. I know what he said.

THE WITNESS: Well, I am sure there are documents, lots of uncorrelated information. However, I have always felt very, very secure in that if you -- if it pertains to the individual, I would have it.

Q What is the basis for that security?

A Because I asked the agencies involved whether there is -- one of the steps that we take when we review a case is to go to the various agencies and ask if there is any additional documents when we prepare the case.

Q What agencies do you go to?

A The Defense Intelligence Agency, the Joint Casualty Resolution Center.

Q Do you go to the State Department?

A Not specifically, no, sir.

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Q Do you go to the Central Intelligence Agency? Did you say that --

A We don't deal with -- my chief source is with the Defense Intelligence Agency.

Q You have no contact with the CIA?

A No.

Q You wouldn't know whether there are documents there, I assume?

A I wouldn't know.

Q You wouldn't know whether or not there are documents in State?

A State has always made a practice of providing us with the documents that they have on any individual.

Q Do you know for a fact that they have given you everything they have?

A To the best of my knowledge --

Q Do you know?

A They have --

Q Don't give me, to the best of your knowledge. Do you know?

A I can't say positively.

Q Under sworn testimony are you prepared to swear that the State Department gives you everything?

A No, I am not.

Q You are not. All right, that's the answer.

When we made some references earlier to uncorrelated documents, and then I believe there was a glimmer of recollection that you heard that phrase, could you tell us what you understand it to be?

A Well, I am sure that -- from what I have heard, that we are talking about reports that may or may not have any validity into the operations of Southeast Asia.

Q I see. Well, tell me more about these --

A These things that deal with the operation and that deal with the collection agency that deal with any number of things.

Q Do documents such as that exist somewhere? Is that what you are telling us?

MS. BUCK: Objection.

THE COURT: I will permit it.

If you know.

THE WITNESS: I don't know about all of them. I know that -- and I feel very, very good that if it pertains to an individual -- you see, Mr. Foley, I don't want to know about -- all I want to know in my job is what happened to the man, what happened to him, how is he, where is he, what could have happened to him. I don't need to know all uncorrelated information or things that don't pertain to the individual. That's not my bailiwick. I want the information on the individual. That is what I am after.

Q When you take -- when you have to start satisfying yourself as to what it is that is relevant to the man, can you make that determination without inspecting all available material before you make a decision as to -- in your mind as to whether or not something is relevant to the man?

A To begin with, I don't make the decision. I just try to collect what we need.

Q Well now, we have had some description in a brief here that was filed in this court that you have to function by a standard that is called reasonableness. I assume that since the Government recognizes that as their duty and obligation, you have some way to apply reason to do what you are doing here? That's why I am asking you --

A That's what I think we do.

Q Now, when you -- you gather a file together for a status hearing and you don't know anything about what may or may not exist in the State Department or the CIA.

MS. BUCK: Objection.

MR. FOLEY: I didn't get through with the question, but I hear an objection.

MS. BUCK: I don't see where it was a question.

MR. FOLEY: Well, you know, there's only one way to find out and that's to let me finish.

MS. BUCK: I realize that, but I think, your Honor, counsel is testifying to things that purportedly the witness has testified to. He can testify himself.

MR. FOLEY: I think I have -- that the portion of the question I asked, your Honor, it is drawn from my recollection of the testimony that we have had here from this witness.

THE COURT: Proceed, please.

MR. FOLEY: I forgot where I was.

THE COURT: No. Let's go ahead.

MR. FOLEY: Do I understand, your Honor, you don't want me to have a repeat of the question that was partially finished?

THE COURT: Yes.

MR. FOLEY: Then I will go on to another one.

Q Do you -- in compiling these records, is it the responsibility of somebody to -- is it the responsibility of somebody to see to it that all relevant records are in that file?

A Pertaining to the individual, it is the responsibility of the branch chief, yes.

Q All right. And do I understand that the branch chief is the man who -- the major in your office?

A That's correct.

Q And do I understand that in deciding whether or not he has gotten everything that is relevant to that particular man, he does not make any inquiries on documents at CIA or State Department and does not examine the so-called uncorrelated files to see if he's got everything?

A We work essentially with the Defense Intelligence Agency, not the CIA. As I mentioned, we go to the Joint Casualty Resolution Center. And the State has assured me through the years that all message traffic that pertains to the individual, they have provided to me. We have gone blank form to the State Department and asked for that kind of information that pertained to that man.

MR. FOLEY: Could I have the answer read back?

(Record read.)

Q The question that I'm trying to get at is this: When this major is making up this file of information, of data, is it correct that he does not -- he has a responsibility of seeing to it that it's complete?

A Yes, sir.

Q And is it correct that in discharging that responsibility he does not check to see whether or not these is any additional information in the so-called uncorrelated files or any additional information that the CIA or the State Department has which pertains to this man who is going to be the subject of the review?

MS. BUCK: Objection.

THE COURT: Overruled.

THE WITNESS: We go individually to the Department of Defense on an individual basis.We go to Joint Casualty Resolution Center. Now, on uncorrelated files, I can't answer that question. I am not sure.

Q Will you answer the question?

A If what you mean by --

Q Will you answer the question this way? What do you do about State? Does he go to State?

A We have blankedly in the past gone to the State.

Q Does the major go to the State Department and say, here is a man I am going to have a review status on. I'm going to do a review on him. What do you have?

A No, we haven't --

Q You don't go --

A Not directly to the State.

Q You don't go? Isn't that the answer?

A No, that is not the answer.

MS. BUCK: Objection.

MR. FOLEY: Your Honor, I'm getting close to the point where I'm going to ask for a direction to the witness to be responsive.

THE COURT: I think he is responsive.

MR. FOLEY: Well, he's certainly not getting to me.

Q Does that particular major go to the CIA when he's preparing a file and say, what do you have on this man?

A I mentioned we don't go to the CIA. It is not in our chain of command.

Q All right. If he doesn't, say so, and we will get on with it.

He doesn't go to State?

A Not on an individual basis.

Q Okay. Fine. We have discussed earlier the fact that the -- we are informed here that you have an obligation -- apparently some kind of instruction to operate on a basis of reasonableness? That is your standard and your criteria which guides and governs the way you operate, from what I hear. Now, tell me, do you think it's reasonable to make a file which purports to be complete and not to go to the sources of information that could possibly have something additional to that file?

A Like what?

Q Like what might be in CIA or State or in uncorrelated documents.

A It is my understanding that the Defense Intelligence Agency or the CIA --

MR. FOLEY: Can I ask for a direction to the witness to be responsive to that question?

THE COURT: I believe it is responsive.

Now, you have been in court before today and --

MR. FOLEY: That is a story I hate to repeat.

THE COURT: You have been on boards. You know there is a chain of command. And even though the colonel is a distinguished pilot, he doesn't go to the CIA.

MR. FOLEY: The point is that he did say that there is a person, a major, who has the responsibility of actually getting it all together.

THE COURT: It is apparent that there is a chain of command. The Intelligence Agency goes over to the CIA and --

MR. FOLEY: I don't know that. There's been no testimony to that effect.

THE COURT: Well, he does. All right. Ask one more hypothetical question and then we will break.

MR. FOLEY: The one I have is not too hot. Do you want to break now?

THE COURT: It's up to you. The jury is on its way back and I am going to --

MR. FOLEY: You have a jury out now?

THE COURT: No. But we have to finish.

MR. FOLEY: All right, this can be off the record.

(Discussion held off the record.)

(Recess taken.)

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DIRECT EXAMINATION

BY MR. FOLEY: (Continued)

Q Colonel Gratch, I would like to return your attention to testimony you gave about exhibits 8 and 10 which were the letters sent out dated August 25th and August 16th. These letters you described as directives, as I recall it; is that correct?

A I believe advisory nature, general procedures.

Q To the extent that these letters purport to create hearing opportunities for people other than those listed in the regulation, namely the regulations say next of kin receiving Government benefits, and your reading of this is that it goes beyond that.

What is the authority for that change in the rules, the change leading to the addition?

A The authority is from the Department of Defense ruling that added to McDonald versus McLucas that only advise primary, or people having Government financial benefits and Department of Defense advise all primary next of kin.

Q You say it was a Department of Defense ruling to this effect?

A Yes.

Q By whom within the Department of Defense?

A It was sometime ago. It was right after the ruling came down. I assume it was -- I can't recall, but I expect it was the Department of Defense General Counsel.

Q Do you know?

A I can't recall.

Q You don't know?

A The exact person, no, sir.

Q Do you kno w when it happened?

A I don't know the exact date, no.

Q Do you know what the authority for it was?

A It was a directive from the Department of Defense to us.

Q Don't these people do something on the basis of some grant of authority to make rules or to do something?

MS. BUCK: Objection.

A This complies with Title 37 --

Q Don't answer, there was an objection.

THE COURT: I'll hear you.

Q Continue.

A As you know, the title 37 governs the reviwing --

Q All right --

A It was later added to McDonald vs. Lucas and the Department of Defense added to that that all next of kin were represented.

Q You don't know whether or not the creation of these two -- withdrawn -- of this rule or directive, or whatever you call it concerning the granting of rights to individuals other than next of kin receiving benefits was accomplished under some procedure authorized by the Secretary of some particular department, or anything like that, do you?

A I know it was by the Department of Defense who signed it. I don't know, but I'm sure we can get that document and make it available.

Q You don't know who within the Department of Defense did that?

MS. BUCK: Objection, what relevance is that?

MR. FOLEY: This happens to be certain legislative requirements, the creation of regulation. I want to know if this thing is even legitimate. I don't think it is.

THE COURT: He doesn't know that.

MR. FOLEY: Would you be kind enough to produce somebody who does?

MS. BUCK: If we're giving more rights than are required, what does he want us not to give the rights, to retract them?

THE COURT: Proceed, move ahead.

Q You testified earlier that next of kin have access to files?

A Yes, sir.

Q You've seen -- you've been in court yesterday and today?

A Yes, sir.

Q You've seen some family's members appeared here and had files with them that they had obtained?

A Yes, sir.

Q Those files are avilable, as I understand it, from the Department 6 Defense, in case of the Airforce to ask your office and you'll be able to furnish somebody with a copy of this particular MIA?

A Yes.

Q Which next of kind can obtain a file such as that?

A The primary next -- let's go back a little bit. Are you talking about the complete file?

Q Yes. Supposing, assuming my colleague, Mr. Bradley happened to be related to an MIA and said he would like to have the file, wrote to you to protect his rights.

A The primary next of kin would get the file, and if the secondary next of kin also, as you discussed yesterday, if the secondary next of kin would like the file, we would go to the primary next of kin and say,"if you have no objection, we'll provide you the file as well."

Q If a secondary next of kin or any other next of kin other than, as you say a primary next of kin, wishes to have a file but the primary next of kin, for any particular reason objects to those other people receiving the file, then you would not give them the file; is that correct?

A Under the privacy act, that's our understanding, yes, sir.

Q You would not give them the file?

A No, but let me point out --

Q Don't point out anything, just answer the questions, please.

A If the next of kin objected to giving him the complete file, that's what we would probably do, the primary next of kin.

Q Nothing --

A That's not true. We don't give them nothing. We give them everything the wife gets.

Q We're talking about the file. You don't give him the file if the wife objects?

A No, sir.

Q You indicate that pursuant to these two exhibits that you just looked at over here (Indicating), if there's a hearing, the hearing is not waived by a next of kin receiving Government benefits, and if it occurs, you do permit attendance at that hearing by other next of kin; is that correct?

A If there is a hearing?

Q Under the rules as they exist in this last month, just before this lawsuit was filed?

A Yes.

Q I don't know if I asked this before, and please excuse me if it's a duplication, but I don't think I did.

If the hearing is not waived, a hearing is held and the next of kin receiving Government benefits wishes to be there but asks you to exclude other next of kin, what happens?

A We feel if there's a hearing and the other next of kin would like to be there, we would allow them to attend.

Q Even over the objections of the next of kin receiving Government benefits, or do you have a rule on that?

A No, we don't have any rule on that.

Q You'll presumably get one when you need it, is that it?

A Probably.

Q What would be your procedure to get that ruling when you need it, how would you go about it?

A (No response.)

Q Would you go up to the Department of Defense and ask them to issue a directive?

A To allow --

Q Yes, if you had a situation where a wife wants a hearing and want nobody else there but herself. You have no ruling, not even a directive from a letter, what do you do, how do you go about getting a ruling on a think like that so you'll have a rule to follow?

A I would have to discuss this with our attorneys.

Q That's what you do, your step number one to get a rule would be to go to the lawyers; is that right?

A Yes, sir.

Q Who would go, they would carry it from there and get some kind of ruling from somebody?

A I presume so.

Q Have you any idea how that ruling would come down, where it would come down, or how it would occur?

A I assume it would probably come from the Air-force general counsel.

Q Tell me, do you know anymore about where and how that ruling would be created than you know about the ruling that resulted in those two letters?

A Probably not.

Q I would like to ask you another situation.

Assuming that there's a hearing, which has not been waived and next of kin receiving Government benefits are present and so are next of kin. The next of kin receiving -- no, other next of kin are present to go -- strike it in its entirety and I'll do the question again.

Assuming there's a status review, a hearing is not waived, next of kin receiving Government benefits are present and also next of kin other than those receiving Government benefits. Are the next of kin who do not receive Government benefits entitled to participate and question and object and generally involve themselves in the proceeding to the same extent as the next of kin who are receiving Government benefits?

A No --

Q Or have you had a ruling on that?

A It is not allowed for under the rules of McDonald vs. McLucas.

Q Therefore, it doesn't happen?

A It does happen and I would like to explain why. Throughout the years, in dealing with the parents as well as the wife, we have always allowed the family members, the parents, to give us any information they felt pertained to the case which is part of the file which the reviewing officer looks at.

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BY MR. FOLEY: (Cont'd.)

Q That's not what I'm after. I'm asking you now, let us assume that there's a hearing and a wife feels she's not going to fight too hard and the parents think they should fight a lot harder and the wife doesn't want them fighting that hard and you're at a hearing. The wife turned around and says, "I want these people shut off", what happens?

THE COURT: Does it ever happen?

THE WITNESS: No, sir, not at a hearing that I can recall.

MR. FOLEY: Your Honor, for the record I would like to say I observed Commander Colgan saying no to this witness. I believe at this stage of the game I would like to have the witnesses segregate.

Did you not do that?

MR. COLGAN: Not that I'm aware of.

MR. FOLEY: I saw it and I don't like it. I don't think the witnesses need anything from the sidelines here.

THE COURT: Let us proceed.

MR. FOLEY: The last question and answer, if I may, please.

(Read back)

BY MR. FOLEY:

Q In the event that it did occur, do you have any rules or regulations or directives or other guidance that would tell you how to handle it?

A Yes, sir.

Q What would you do?

A We would probably not -- or we wouldn't allow --

MR. FOLEY: Objected and stop now.

Q Probably is speculation. Please don't speculate. I'm not asking you for speculation.

A We would not allow the secondary next of kin, not receiving financial benefits, to participate.

Q In other words, their participation is merely, even if they are allowed to attend, their participation and the extent of it is strictly at the sufferance of the next of kin, the other next of kin, who is receiving Government benefits?

A Yes, sir.

Q They obtain, cut them off and that's it, they are through, okay?

A (No response)

Q We had testimony before the break with respect to uncorrelated information. There was one aspect of it that I did not cover.

We covered whether or not the major who is responsible for accumulating the records contacts CIA and state. That was finished. The next question is does that major inspect the uncorrelated information, the uncorrelated document --

A If it's in the file, yes, sir.

Q If it's in the file.

MS. BUCK: Objection, there was never any establishment there is uncorrelated --

MR. FOLEY: We'll establish it now.

Q I would like you to take a look at Exhibits 1 and 3.

(Handing to witness)

Q (Cont'd.) I could shorten things by telling you what you have to look at so you don't have to read a three-page letter.

On Exhibit 1, I would ask you to pay attention to the third paragraph on the first page.

MR. FOLEY: Your Honor, if I may have a moment, I fine I made a mistake on some of the exhibits I brought in.

THE COURT: Take your time. I know it's difficult to put all these documents together.

MR. FOLEY: I'm doing my best. I apologize for taking your time with this.

THE COURT: It's all right. I'll give you the time.

(Pause)

BY MR. FOLEY:

Q Other than looking for it, I'll ask you a question. You may know something about this. Perhaps we can proceed without a document for the second half of this.

Are you aware of -- strike it.

Were you here yesterday morning when I gave some testimony about a freedom of information request I made in March of 1975?

A I was here for part of the morning, yes, sir.

Q Were you aware of that freedom of information demand before yesterday?

A I understood in thepast that you had made a freedom of information request for document of the Department of Defense and it was accumulated for you and you didn't pick it up.

Q Well, that's not quite the case. The answer to the question, apart from the gratuity apparently you desire to add is that you were aware that I made that freedom of information request; is that true?

A Yes, sir.

Q Are you aware of the fact that I received a letter which I regretfully cannot find right now, indicating that there were hundreds of thousands of pages --

THE COURT: Yes, we have it in the record.

MR. FOLEY: I can't find the record.

THE COURT: I remember it.

MR. FOLEY: I would like to have told him about it. I would like to ask him about those pages.

THE COURT: You may look for it.

MR. FOLEY: Let me take a look at that Exhibit No. 3, again.

(Pause)

BY MR. FOLEY:

Q I would like to direct your attention on Exhibit 3 to eight lines up from the bottom, the sentence beginning, "Consequently -- "

These tow letter we find that Exhibit 1 is a letter from me to the State Department making a record of a telephone conversation in which I claim in this record, in this letter that they told me they had 875 cubic feet of files which were yet to be examined and in Exhibit No. 3, they maintain that to obtain and furnish me with the documents I demanded from the Department of Defense, the time frame would encompass several years, estimated additional search and production costs reaching into hundreds of thousands of dollars.

You see those two notes there (indicating)?

A Yes, sir.

Q Have you any idea how many documents we're talking about here?

A No, I have none.

Q The 875 cubic feet, the letter Exhibit 1, also indicates that I am telling them that they told me that they estimate those things are filed at the rate of 250 pages and in which I must say surprises me but that's what they say; do you see that there (indicating)?

A Yes, sir.

Q I think that if all of this is true, without counting pages or anything else, we're talking about a pretty significant amount of documented pages, I think that's reasonable, wouldn't you say so?

A Yes, sir.

Q Tell me, how many of these -- do you know how many of these are included in files that are being accumulated for ultimate consideration in status review proceedings?

A I feel very certain if it pertains to an individual --

Q Don't feel. Once again I'm interrupting you and stopping you because I don't want speculation. If you know, say so, if you don't, please don't.

A I can't positively say.

Q The answer is you don't know; is that correct-

A That's right.

Q Were you aware that this volume of documents existed at any time?

A I've not seen those figures before.

Q You h ave indicated that you have heard some reference to a thing called uncorrelated documents. Are these documents that are not in files of individual men?

A If they didn't apply to an individual they wouldn't be in the file.

Q The answer is yes, isn't it, they are documents that are not --

A I don't know that, I can't say.

Q Where would they be correlated to if not in the files, have you any idea?

A No.

Q Are you in a position totell us whether or not this major whose obligation it is to gather up all the relevant information goes to these 875 cubic feet of documents and these hundreds of thousands of dollars worth of documents that we've just been talking about to see whether or not there's anything relevant there?

A I think I mentioned earlier where he goes.

Q No, I didn't ask you to repeat yourself. I'm asking you whether you know if he goes there?

A He goes to the Defense Intelligence agencies --

MR. FOLEY: I wish to strike that answer.

MS. BUCK: Objection.

MR. FOLEY: I ask for a responsive answer, he either knows or doesn't.

THE COURT: He obviously doesn't know.

MR. FOLEY: Let him say so and we'll get on with it.

MS. BUCK: The Government objects, what relevance does it have.

THE COURT: The claim is they have all these piles of documents containing all this information they don't use.

MR. FOLEY: Let us move ahead.

BY MR. FOLEY:

Q Colonel, Gratch, I would like to show Exhibit 26, (Handing to witness). Are you familiar with that document?

A I haven't seen it, no, sir.

Q Did you know that it was being prepared at all prior to the briefing of the Woodcock Commission in March in Hawaii, we heard testimony about today?

A Did I know there was a briefing being prepared --

Q Did you know this document was being prepared to be used -- or any type of information --

A No, I didn't.

Q Have you read it?

A No, I haven't.

Q To be fair to you, if you want to take a look at it, I'll wait a minute.

THE COURT: No.

Q This document indicates that man fall into five categories which are briefly described in thelast couple of pages. I would like you to take a look at those.

(Pause)

A (No response.)

(Continued on next page.)

DIRECT EXAMINATION

BY MR. FOLEY: (Cont'd.)

Q Are you familiar with this type of categorizing of M.I.A.?

A No, sir, we don't categorize. The Air Force doesn't categorize, we place each one on an individual basis. I don't have any category.

Q Let's take the first one, category one is confirmed knowledge including person identified by the enemy by name; (b), identified by reliable information received from releasees, escapees; (c), reported by highly reliable intelligence source; (d), identified through analysis of all source-intelligence.

How many M.I.A. and P.O.W.'s do you have in your open files now?

A 380.

Q How many of those would fall into that category, if you know?

A We have to look at the circumstances to specifically say.

Q You don't know right now?

A I don't know.

Q Can you tell me whether or not any of the men you have observed being the subject of determinations of death over the last period of years since the Paris Agreement would fall into that category?

A How many?

Q Would any?

A Yes.

Q There are some men who are subject of determination of death whose situation would qualify for category one?

A Yes, sir.

Q Do you know -- do you have some in mind? I'm not going to ask you for names, if you have some in mind I would like to know.

A Off the top of my head, I don't.

Q Can you tell us whether or not some of those were situations where a hearing was waived and the man was declared dead?

A I am sure there probably was but I can't say until I look at the files.

MR. FOLEY: I would like to put this aside for just a moment and perhaps come back to it later.

Q Are you aware that in the period of the last several months the United States, I guess the Department of State, the United States Government, has had, I believe, its two negotiation sessions with the Vietnamese in Paris relative to the obtaining of an accounting for M.I.A.'s?

A (No response.)

Q Are you generally aware of that fact?

A Yes, sir.

Q Are you knowledgeable on details respecting those negotiations?

A No, I am not. I wasn't involved in the actual --

Q You didn't participate in the negotiations?

A No, sir.

Q Did you participate in any peripheral way?

A Providing information as we always have done.

Q Providing files on individuals and that kind of thing?

A Information that we have has been provided.

Q Are you in a position to know what is the standing or status of those particular negotiations right now?

A No.

Q Do you know whether or not they have failed or are over?

A I don't know.

Q Is it your understanding indeed the effort is ongoing to get --

A I think it has been throughout the years an ongoing effort.

MS. BUCK: Objection on the grounds of relevancy.

THE COURT: You may continue.

Q Is it your understanding that a problem has developed with respect to these negotiations which deals with what type of reparation the United States would pay to the other side?

THE COURT: Sustained.

MR. FOLEY: If he knows.

THE COURT: I won't take it from him.

MR. FOLEY: If he were not present I would be glad to tell you the relevancy.

THE COURT: He doesn't know the --

MR. FOLEY: If he says so --

THE COURT: Do you know anything directly?

THE WITNESS: No.

Q Now, looking at the standard that you live by, reasonableness, I want to ask you whether you regard it as reasonable for anybody to enter into a process of determining whether somebody is dead or alive under circumstances where they don't know whether or not negotiations are progressing which may lead to furnishing real information of that man.

A Yes, sir, the --

Q What was the first part of that answer?

MS. BUCK: Objection.

THE COURT: Yes sir, is the answer.

Q Colonel Gratch, are you acquainted with the ramifications of a determination of death beyond the consequence of it after your office is through with it, such as what it does to pay in allowances?

A Yes, sir.

Q You are knowledgeable in that field?

A I am.

Q I would like to ask you first of all whether or not in all cases when a determination of death is made the pay and allowance is in fact terminated?

A The same as if I were killed, yes.

Q The answer is yes?

A Yes.

Q Are you aware of USSDP accounts?

A Yes.

Q Are these bank accounts in which missing servicemen are entitled to deposit their money, (a) in allowances, and receive an interest at the rate of ten percent?

A Yes, sir.

Gratch-direct

Q The last question I stated that it was missing servicemen had that right, does anybody else?

A Men still carried as P.O.W.'s.

Q Captured and missing status?

A Yes, sir.

Q When status is changed from missing to dead, when a determination of death is made, can they continue to carry the money in that account beyond a short period of time?

A Ninety days.

Q Then they have to take it out?

A No, sir, they can leave it in.

Q For 90 days.

A The account draws interest at 90 days.

Q What interest does it draw after --

A None after 90 days.

Q Up until that period of time, it is -- during the missing status and this period until it's wound up, it gets ten percent?

A Yes.

Q Now, what happens to the accumulated assets that you folks have a hand on of an M.I.A. or P.O.W. declared dead, what happens to all the money?

A It depends on who he had designated to receive the money. You have to look at the record to --

Q Is that money distributed to other people other than the man who has been determined dead?

A Yes, sir. The person he has designated to receive it.

Q Gets it? It's gone? You don't have it anymore?

A Not after he is declared dead.

Q It's gone to a third party?

A Whoever his beneficiary is.

Q what provision is there to recapture that money from those persons if it is found later that the determination was in error?

A It would be repaid.

Q By whom?

A You are saying that if the individual were declared dead and later turned up alive?

Q For any reason, the determination of death was rescinded, court order, found alive, he walks out of the jungle?

A He would be reinstated.

Q Back into what?

A Active Force, like we consider all of our missing people as active duty, as I am.

Q What would be done to capture the assets that were distributed to third persons? I understand you have cases you are holding up to $300,000?

A We have $3,000,000 --

Q Some of these cases have a lot of money?

A Yes.

Q Some of them as much as $300,000?

A Not that large.

Q $200,000?

A Right.

Q There is $200,000 of somebody's money going out to Joe Zilch or --

A Usually his wife or parent.

Q What do you do to get it back?

A We would repay him. The Secretary of the Air Force.

Q You just pay it a second time?

A Yes.

Q Oh. One moment, please.

(Pause.)

Q You are not a lawyer, are you?

A No, obviously.

Q That is a pity.

I would like to show you a section of the Code even though you are not a lawyer because you deal with the settlement of accounts and you are aware of this particular matter --

MS. BUCK: Objection.

THE COURT: I will permit it.

MR. FOLEY: For the record, what I am showing is United States Code entitled 10, Section 2771D.

I would like you to take a look in particular I am thinking of D over here (indicating).

I ask you if you are acquainted with it? I won't ask you for any legal opinions about it.

A No, I'm not acquainted with it.

Q Did anybody ever tell you it was unlawful to pay out this stuff twice and a violation of Federal Code?

A No, sir.

Q Just to recall for my own recollection, how long have you been in the P.O.W., M.I.A. --

A Close to eleven years.

Q You have seen some families that have fought pretty vigorous fights to avoid a determination of death, in terms of vigorously opposing a status change?

A I couldn't say vigorously.

Q As vigorous as Martin?

A Martin, yes.

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Gratch-direct

Q You've seen a few of those?

A Yes.

Q Have you ever been told or given any information that would indicate to you what the cost of that is in terms of legal fees and disbursements?

A I only heard what you testified to.

Q You don't have that from any other source?

A No.

Q Then I won't pursue it with you.

Tell me this, 90 days after a determination of death, there is a termination of interest in the USSDP account and we covered that fact that assets get distributed and we covered the point you are making that the Government may repay some of this if it is found to be in error later on.

During the period between the time that interest in the USSDP account ceases, and the man is reinstated, what interest rate is he paid by anybody for the loss of his assets during that time?

A Ten percent.

Q By whom?

A By the Service.

Q It's not in the Service. I am talking about the USSDP --

THE COURT: I am not sure I understand.

MR. FOLEY: Let me rephrase it.

Q Let's start back a little ways.

There is a determination of death. A man thereafter has 90 days to get the assets out of the USSDP account or his representatives do. If they don't the interest stops. We will take a situation three or four years later it's found there was a mistake and for some reason he is reinstated.

MS. BUCK: Objection. This man doesn't settle accounts and we have somebody here --

MR. FOLEY: If they will undertake to present h him.

THE COURT: If you want to call another witness I will let you do so.

MR. FOLEY: I will get back to this.

Q What happens after a determination of death in terms of communication between your office and the families of the men who are the subject of those determinations, do you stay in touch?

A Yes, sir. If there is any additional information we have, such as information about return of remains, etc.

Q I have heard that the Air Force in particular and the Casualty Office in the Air Force in particular makes a practice in keeping in communication with families and asking them, how are you doing, is that correct?

A Yes, sir.

(Continued on next page.)

Q Does that type of thing continue after a determination of death is made?

A Yes, sir. It continues until the adjudication of all benefits, all the Social Security, Veterans' Administration, et cetera. We assign the assistant to a particular place in the area of a wife and this individual would help her in any way possible. We also have a 24-hour, seven-day telephone number --

Q That is after the determination of death?

A Yes, sir.

Q Because of all this communication with the family after the determination of death, do you have any awareness of what the economic impact on the family is because of the determination of death? What I am saying is, they get a lump sum and thereafter in lieu of military pay they get Social Security, VA benefits, various things like that, are you aware of how those ongoing benefits afterwards compare sizewize with military pay and allowances, are they just as big?

A No, sir. This was brought out before the testimony of the --

Q I'm asking you for an estimate.

A Considerably less.

Q Have you heard from any families with respect to --

MS. BUCK: Objection. What relevancy does this have?

MR. FOLEY: It's right in the brief.

THE COURT: I don't see it. We are not talking about those who are getting benefits.

MR. FOLEY: Judge, I recognize that problem. That is not what I am driving at.

THE COURT: I don't understand.

Q Have you had actual conversations with some of these families who are in this decreased income situation?

THE COURT: I don't understand the relavancy.

MR. FOLEY: Will you allow me, subject to connection?

THE COURT: All right.

Q Have you had any knowledge or understanding or experience that would tell you what the impact of this diminished income to the family is to their ability to continue a fight or search or trips to Southeast Asia themselves or whatever else they might do to secure information about the man that could lead to a possible recision of the determination of death?

A It depends on how much money they have. Some families are better off than others.

Gratch-direct

Q Do you have any experience on it? Do you have any information that would lead to some kind of judgment as to whether or not they are able to do more or less for the man when the salary is diminished?

A I haven't talked in those terms, no, sir.

Q Returning to the question we asked earlier about the current status of negotiations, an accounting, et cetera.

Do you know whether or not the effort to obtain information and an accounting is an ongoing operation currently of the United States Government?

A We have always been assured of this by the State Department.

Q Now, we have had some evidence here over the last couple of days that there may be classified and unclassified information about any particilar man -- in some instances maybe all --

A Few, I would say.

Q Some classified files and others not.

A The Air Force has declassified the majority.

Q Does that mean that you did not declassify them in terms of the question I asked you that there are some --

A There are a few.

Q That's all I was asking.

Now, in the event you have a status review and there is a classified file, what happens to the information in that file if it's not declassified in terms of the status review? Is it considered?

A It is considered in its unclassified version. The actual document, no, sir.

Q Two of us can't get on the record at the same time. I didn't ask you about unclassified information. I'm asking you about classified and I want to know about that --

A The substance is provided in the review when it's made.

Q I will ask again. Is the classified information --

MS. BUCK: Objection.

THE COURT: Overruled.

Q Is the classified information made available for the status review?

A The source document is not.

MR. FOLEY: Judge, can I have a ruling --

THE COURT: He is trying to answer if you allow it.

MR. FOLEY: If he would tell me it is or it isn't -- that was a fresh statement to make, I apologize, Judge.

THE WITNESS: What I'm trying to say is if the information is classified in a classified document we have extracted the content of that information as it pertains to that particular individual so that the family is advised.

Q There is nothing really left, you declassify the whole thing?

A I haven't gone into the sources or where I got the document from.

Q All of this pertains to a war and they are trying to save things from an enemy?

A (No response.)

Q Who happens to be the enemy?

A I can't answer that.

Q There is a reason why you can't answer it?

A I don't classify this material.

Q I was about to ask if the families were the enemies.

MS. DUCK: Objection.

MR. FOLEY: I will withdraw the question if it makes any difference.

Q Now, to get back to it, you make all sorts of efforts to declassify and you extract and exclude and you have some classified files. Do these files after all the efforts are accomplished, do they get into the status review?

A The actual file doesn't, the content does.

Q In full or a summarized or sanitized version?

A I can't say in full because that would be the source document.

Q What is kept out?

A The source document.

Q In other words, when all the sanitizing is done, the file is left and it relates to this man, it doesn't get considered by the review board and it doesn't get seen by the next of kin, is that correct?

A That is not accurate.

Q The answer is it is incorrect? You are saying under oath it is incorrect?

A I am saying that the contents for the purpose of that board, whatever the classification is, is provided for everyone --

Q Have you just testified there are some materials that are not declassified?

A Yes.

Q I want to know what happens to that? Does it

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or does it not become available to the people who are making this decision as to whether the man is dead or alive and does it become available to the next of kin if they happen to be there and interested in doing something --

A The actual source document is classified and would not be made available.

Q Is the plain answer we have been trying to get for 15 minutes, if the document is classified it stays out? If it remains classified it stays out, is that correct?

A Essentially, yes.

Q May I ask you, all this time I was asking this question, didn't you realize I was trying to get at that?

THE COURT: Please. I think his answer was straightforward.

JB

(continued next page)

Q Well, --

THE COURT: Go ahead.

MR. FOLEY: All right.

THE COURT: As I understand the circumstances, they hold the original source documents, but they give the information, except that information which might lead, for example, to the name of the spy or the special instrument that gets the information. And it's a perfectly reasonable method of operation, it seems to me.

MR. FOLEY: I am sorry. Did I interrupt you?

THE COURT: I don't see the --

Q Well, is there any specific direction or regulation or criteria which limits what can be kept out in terms of just what the Judge said, the name of a spy or something like that or is that left up to somebody's discretion?

THE COURT: You know that a lot of these documents are overclassified.

MR. FOLEY: Judge, I know that. But I don't know that only source documents that would reveal National secrets such as the name of the spy are kept in --

THE COURT: You and I know there are a lot of other classifications. We have seen them.

MR. FOLEY: Judge, I am aware and I agree with you.

And there may still be, and that's what I am pursuing.

THE COURT: I will take judicial notice of it.

MR. FOLEY: Will you take judicial notice that some of the files, even after they are sanitized and worked out, are still overclassified?

THE COURT: Of course.

Q Now, when you're deciding to declassify documents such as this, who does that?

A There's a procedure set forth wherein we have the documents and we go to the originating organization and request that they declassify.

Q In other words, you people have documents there when they are still in classified form?

A Yes.

Q You inspect them?

All these people have --

A We have embarked on a classification program of some years ago.

Q Yes?

A Where we have declassified thousands and thousands of documents. It's quite an administrative process because you have to go to every organization that has that particular classification, be it secret, confidential and we go by message to all those concerned requesting that the declassification -- because if it's declassified, everyone has to be notified that this particular document is declassified, and so I am not carrying any secret document in my file when somebody has a declassified one in some one else's file because I didn't get the word. It's an extensive process.

Q Cross checking between various places?

A Yes.

Q That's fair enough.

You say that this process of declassification is going on for years?

A Yes, sir.

Q You say thousands and thousands of documents have been declassified by now?

A Yes, sir.

Q And let's be a little tighter on how many years this process has been going on. Has this been sincethe Paris Peace Agreement?

A Yes, sir.

Q Now, as time goes on, do you feel clearer and clearer records are developing in terms of the classified and more material is going in there?

A Yes.

Q And in a sense the passage of time here has resulted in better available records inasmuch as additional material is concerned?

A We have source documentswhich were the basis of the information that we have provided through the years in unclassified version to the families. Just like you mentioned the other day about the records, you are always finding new stuff thrust in.

Q Incertain -- and this is the result of the declassification which in certain -- usually it's to back up what we have told the families at some time. And now they see the actual document. They see that it was secret and it's been crossed out.

Q Is it your testimony then in fact as time has gone by all of these declassifications have resulted in nothing more than augmenting information that was already in those files?

A That's right.

Q No new stuff coming in?

A Very, very little new stuff other than the return of the remains.

Q D id you happen to hear Mr.Brooks' testimony yesterday?

A Yes.

Q Now, when people show up for a status hearing and they take a look at a file and a summary which is prepared by your office -- is that not correct?

A Yes,sir.

Q As far as the evidence that the Government makes available for itself,that it presents, shall we say, to the hearing officer or reviewing officer or officers, or whoever happens t. be there preceding, is there anything more presented by the Government other than documents?

A We respond to any questions that the families have for clarification.

Q I am --

A But as an actual presentation--

Q I am talking about evidence.

A It would be the case file, yes, sir.

Q Just documents, right?

A Yes, that's correct.

Q If a family asks you to produce live witnesses there rather than just a condensed version of their debriefing or something like that, will you produce them to give testimony and subject themselves to cross-examination?

A If we can locate these witnesses -- now, we are talking about people that have --

Q Suppose you can --suppose it happened to be a returning POW, and long behold he happens to be stationed right there at the office next to you, and just at random, somebody says, I want this guy in here and I want to put him on the grill. I want to examine him and cross-examine him, and I want it done vigorously, under oath, in person, the same way you are right now. Will you present him?

A We certainly will do our best.

Q D o you have any ruling on it at all?

A We haven't had that request.

Q You never had it?

Nobody has ever asked for live witnesses instead of just the documentary evidence?

A No, sir.

Q Is that true?

A That's right.

Q Nobody has ever made that request?

A Not to my knowledge.

Q Have any of the families ever when faced with or even after a status review takes place asks you to help them get in touch with the people whose statements are contained in the file?

A Yes, sir, we have.

Q What is the procedure for that?

A We notify the individual concerned that so and so would like to contact them and it's up to them whether they

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would like to.

Q You know over the last couple of years when I have been taking a look at military regulations I noticed a phenomenon that may be helpful here. And that is in the military there is heavy reliance on forms. Now, I would like to ask you whether or not everytime you communicate with somebody and say such and so would like to talk to you, do you not also say, however, you are under no obligation to talk to that person?

A We have said that, yes, sir. Because, you see, when a letter comes from our headquarters, when we ask some one -- being headquarters Air Force they feel this is a directive in nature and it is not a directive in nature. We are passing this request on for the family.

Q Wait a minute. Do you say that if you send a letter to somebody saying, Mrs. Jones would like to talk to you, and if you want to contact her, here's her phone number, that he can consider that an order unless you also told him it wasn't?

A He could by virtue of the level of the command he's dealing with.

Q Wait a minute. He could? That's not what I asked you.

A I don't know.

Q I asked you, if it was your testimony he would.

MS. BUCK: Objection.

THE COURT: Sustained.

Q Have you any experience for believing that he would?

THE COURT: Sustained.

Q Has it ever happened -- No, correction. Withdraw the question.

Is this advice or this use of language indicating that you are not obliged to contact the person generally in such a letter?

A Generally, yes.

Q And for how long has that been going on? In other words, was it --

A A couple of years.

Q To put it differently, was there a time you recall that that wasn't usually put in the letter?

A No. Generally, it was always in the letter.

Q I see.

You don't recall offhand that at any time it wasn't in there?

A I don't recall. I'm not saying it wasn't.

Q I understand. You just don't recall. All right.

Now, we have observed here that some of the family members have files? We have been in that before? You recall that?

A Yes.

Q Have files been available in that way continuously to family members during the period that you have been in this particular area of work?

A The actual file itself?

Q Yes.

A Initially, no, sir.

Q Let's say two or three years ago, if John Bradley here, my colleague, had a relative who was a MIA and wrote you a letter saying, send me a copy of the file, would he have gotten it?

A We have mailed some -- over sixty files to families that have requested this.

Q Yes.

But this is recently? Relatively --

A Over the last several years.

Q It's going on for several years?

A Yes.

Q All right. That's what I wanted to know.

Thereafter, is there any effort made to update the files that those families have?

A You're talking about now --

Q Making changes in the file?

A No. Yes. If there is any additional information updated to the extent that, say, we perused a file for a missing in action wife and --

Q Yes.

A Ok.

Q Give me an example. We had a witness on the other day, Mrs.Bosiljevac, right? She has a file. She obviously got it from you.

Well, now, thereafter, if an addition or changes are made in that file in your office, is she given the updated changes so her file in tandem with yours?

A She wouldn't get copies of every piece of correspondence unless there were a directed. If we had information to provide Mrs. Bosiljevac with, we could do so in letter form directly to her. But, for example, -- I don't know what a good example is. But if it were a document that really didn't pertain -- or she called in saying that one of her children were sick and she needed some help from the hospital or something of that nature, chances are we would not provide her a copy of a memorandum to that effect.

Q Suppose it was something of a personal nature, like she ran a garage sale and that wound up in her file. Would you be kind enough to let us know that you had this information, that we have your garage sale in the file, and now you -- so you can get your update?

A No, we probably wouldn't.

Q Probably not.

Now, apart from making files available, do you have any procedures whereby a family can engage -- do you know what the word discovery means?

A I am not sure I understand the legal terminology.

Q Let me give you an example and see if we have anything analogous in your procedure. You know, when we have a lawsuit in Courthere, to get ready for it, it's considered the civilized thing to do to let each side make inquiries of each other, check things out, have them take depositions, give them interrogatories, so that everybody comes in with a fair chance on both sides to get all the knowledge and then they can try the case. Otherwise, it's considered kind of barbaric. Do you understand?

A Yes.

Q So I am just wondering what do you have here when somebody gets a file and they take a look at it and they see something in there, debriefings of some kind, and it is sanitized and some summaries in the file, and they would like to have an opportunity to take that man's testimony in conjunction with the -- or in preparation for the status review, and they would like to ask him some questions on an official basis and make him answer, do you have anything in your procedures at all to accomplish this?

A We could contact the individual. Contact the individual for any statement he would so desire.

Q It would be what he desires, is that it?

A What the individual looking at the file would like.

Q Would you then -- I mean in that letter, would you also tell the individual from whom the information is sought that he's under no obligation whatsoever to respond?

A You have to give me a set of circumstances.

Q I am giving you one right now. Assuming my colleague, John Bradley over here, is related to an MIA, and assuming that he takes a look through his relative's file and he sees that there is information here that some returnee or somebody or other gave information which is only contained in the file in summarized fashion, right? Like you -- you don't put a whole debriefing? You summarize?

A We put a debriefing in there if it pertains to the individual.

Q Verbatim or summarized?

A Generally we try to get it verbatim unless it pertains to other areas or other people that are not --

Q Are you telling me it could be both, depending on the circumstances?

A Yes.

Q Well now,let's assume that it strikes him to defend his relative whose an MIA-- to defend him the right way, he would like to get a hold of this source and he would like to ask him some more questions and to go a little more deeply so that he could prepare for the status hearing.

A We have done this with just about all of our returnees.

Q Who has? The families?

A The Air Force has. When the families came to us, when the men came back and they were debriefed on certain individuals, we provided this as quickly as we could to the families when the families came back and said, hey,we want to talk to the individual.

Q Right.

A In all cases we have gone directly to the individual and told him, would you get a hold of so and so and talk with him?

Q That's what I wanted to hear.

A Explain it better.

Q T hen you get a hold of that fellow and you tell [illegible] that somebody would like to talk to him; is that right?

A Yes.

Q And in that letter, do you --

A Normally we didn't always do it by letter. We did it -- very often to expedite the circumstances, we would call the man directlyand say, Mrs. Jones or some one, and in that case there was no letter.

Q Fine. Now, would you be sure that he wouldn't consider it an order to go ahead and talk now, and just to assure yourself against that,would you tell him that he is not required to do this, to contact these people?

A Yes. Mr. Foley, we are trying to get as much information as we can on this individual.

Q You know, Colonel Gratch, I am trying to get information now and I am not--

MR. FOLEY: Pleaee read the question from the record.

(Record read.)

THE WITNESS: No, probably not.

Q Now, in earlier testimony, as I recall it, it was that you -- is there a general practice that when somebody wants to talk to somebody else,you tell them so and so would like to talk toyou, but you are not required to talk to them? Do you remember that testimony you gave earlier?

A Yes.

Q Now, in the case of any information in a file where somebody wants to --

A If wewrote him a letter, we would say, you are not required.

Q I see.

B ut if it happened to be just the other way around and you just happen to contact him on the phone, you would avoid saying that? Is that true?

A Probably.

Q Why?

What is so different between a letter and a telephone communication where you've got to give the opposite approach?

A When you asked me a question earlier, I assumed you were referring to a witness' statement of people that was made maybe back in 67 or in 67. It's a long time ago, as opposed to people coming back and telling us what happened to an individual.

Q Let's just correct all of this now. What would happen in 66 and what would happen now? Why not give me both ways? And maybe we can clarify it that way.

A Well, we have very often gone back in 66 to the witnesses.

Q We are going off the rails. Let's get back on this thing. I am asking you, if there is information in a file--

A Generally, to answer your question, we would probably say it's not -- you know, you don't have to do this.

Q All right, that's what I am trying to get at. You do the same thing you always do, don't you?

A Yes.

Q No different. All right.

Now, is there any information in your proceedings or in your rules or regulations anywhere inwhich the -- if the guy decides that he just didn't want to be bothered talking to the family, they have a way to get to him and make him produce the information? Do you have subpoena power or anything like that?

A No. We ask him to produce a statement that we have never subpoenaed.

Q I am not talking about asking about a statement?

A We do not.

Q If the man --

A No, sir.

Q If the man is a reluctant witness, just didn't want to get involved, is there any way that the family can go and get his testimony?

A I am sure there is. But we haven't been faced with that yet.

Q What makes you so sure that there is --

A I don't know.

You're able to do it. I would expect that the Air Force can.

Q The fact of the matter is you don't have in your rules and regulations -- it's up to them to go to a Court, sue somebody, do something outside your procedures or something whatsoever; is that right?

A Yes.

Q I see. Now, do you have any formal set -- I am not talking about strict rules of evidence. I am talking about a formal set of any rules of evidence that prevail at your hearings or procedures or whatever they are.

A Formal rules of evidence?

Q Yes.

Strict or unstrict. I see the word strict all the time. I don't want to hear about strict. You have rules of evidence?

A As to what we base the case on?

Q Yes.

You saw the Judge up here tell me once in a while that I'm not asking the proper question. And no doubt he's right.

A Based on the witness' statement, the circumstances--

Q No.

A The case file --

MS. BUCK: Mr. Foley, the Government will stipulate that there are no formal rules of evidence.

MR. FOLEY: All right. How about rules of procedure? Will you stipulate?

MS. BUCK: I am not sure what you mean by rules of procedure.

MR. FOLEY: Ok.

Q Do you know of any rules and procedure that govern your proceedings?

A As I mentioned before, the rule would be in compliance with McDonald against McLucas, Title 37; notification of families. Everything we have to do is --

Q In other words, there are no rules beyond what is in that one rule you showed me and that we talked about and you testified to earlier? That is the rule?

A Yes.

Q Now, do you have any directives such as this October 23rd or this August 25th letter that augments the actual procedures howyou -- you know, how you proceed, how you send out --

A We have some drafted directives that are not formalized.

Q Are they followed?

A We haven't used them yet.

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Gratch-direct

Q Oh, you mean they are in preparation, but as of right now, they don't exist?

A That's right.

Q Who's drafting them?

A Our legal people.

Q I see.

What happens? What lies between us then and the creation of these things? Where do they go from here? What's going to happen to them before we start to hear about them?

A T hey are explained in the letter.

Verbally, I went over them.

Q All right. In other words --

A We notified the families. We tell them what they have.

Q You're talking about what is in these two letters here of the 16th and the 25th of August?

A Yes.

Q I thought you had some new rules? Are those rules then not operative now? The rules that are referred to in those two lettersof August 15th and August 25th or directives, as you call them?

A They are not operable now. Whether or not because we are under the temporary restraining order, but I would expect --

Q Is that all that is stopping you? They are otherwise operative, everything that is in there?

A I would expect so. Yes, sir.

Q Well, do you know?

A Yes,sir.

Q Are these the rules now or are they not? That's what I want to know.

A They are.

Q Ok. Now, is it not a fact that every one of the men who's currently in missing or captured status has already been the subject of a status review? I am talking about the 12 months and that business, you know?

A Yes.

At the end of every twelve months --

Q The first twelve months?

A Yes.

Q Not every twelve months. The first twelve months?

A Yes,sir.

Q Right. At the end of that period every one of these men who's in missing or captured status today, or, indee every one of them who is in missing or captured status, or at least at any time after one year after the Paris agreement something happened, that there was a determination to continue him in missing or captured status; is that true?

A Yes.

Q Now, going back to 19-- say 1974-- a year after the Paris agreement is the time I am figuring on -- what did continue and missing status imply? What was that apart from just a status? Was it a finding that he was dead or alive, or you are not sure or what?

MS. BUCK: Objection.

That's a matter of law.

MR. FOLEY: No. That's not what I am talking about.

THE COURT: I don't understand why you are asking this witness that question.

MR. FOLEY: Paragraph 23 of the complaint, Judge.

THE COURT: No.

THE WITNESS: Will you go over that?

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Gratch-direct

DIRECT EXAMINATION

BY MR. FOLEY: (Continued)

Q What I want to know is this. A man is held in missing status. Is it fair to say that implies that there was some reason to believe he was alive or no reason to believe he was dead?

A It would indicate that there's a reason to believe he was alive.

Q There was?

A Yes.

Q In your mind then, does that in effect create a resumption that he continues alive?

A He is continued alive.

Q Yes --

A The payouts --

Q I'm not talking about the fact that you're on the payroll is the only proof you're alive, but I'm talking about apart from the question of pay, what does it signify in terms that you believe that he's dead or alive when you continue him in missing status?

MS. BUCK: Objection.

THE COURT: I have to find out how this group makes its mind up. I'm not sure.

THE WITNESS: If I can explain --

Q Yes.

A Throughout the conflict, the end of the year review is required in every case in missing in action status. Throughout the conflict we felt that the individual had a chance to survive. We just didn't know, quite frankly. We really didn't know until prisoners came back and debriefed and gave us all the information we have today. So, to protect that individual, just to protect the member himself, he was continued in a missing status for years, many years, since 1964 and still in missing status. That's until the end of hostilities.

Q Did you put him in missing status because you didn't know that he was dead?

A (No response.)

Q Isn't that what it implies?

A We didn't know anything other than what the facts stated. We felt there was a reasonable --

Q Let's put it this way. During that period of time, you wouldn't put him in dead status because you didn't know he was alive, would you, simply that?

A We have changed some statuses on the facts, declaring them dead.

Q Now, or back during the war? That's now, isn't it?

Gratch-direct

A No, that's then.

Q Then. In 19 -- let's say 1972-'73, thereabouts -- strike the question.

When you have a status hearing, you go over some of these letters and various things I hear about, folks are getting on the phone, from your office and other places, a feeling exists, and I would like you to tell me if it's accurate that if you elect a hearing at a status review now, the burden is on the next of kin who opposes a status change to show the man is still alive; is that true?

A It's hard to say, to have the status change. I can't say the burden is on the next of kin. I can't say it's on anyone. The fact is the case is reviewed on passage of time, the merits, what actually happend, what we know about him. That's -- I can't say.

Q I want to ask you this. If somebody said to come down -- strike that.

When you have a status review today, are you looking to see the actual thing you're trying to get evidence on, as I understand it, is whether or not you can have -- I think the word used is a basis for believing he's still alive; is that correct?

A I suppose that would probably be an accurate statement.

Q Do you know what I'm driving at?

A I'm not sure.

Q I'm trying to get at just what's the focus that has to be proven or shown at a status review at this point. If somebody comes in -- do you ever reach a point, or contemplate reaching a point at the status hearing when somebody is told, "This is not why we're here, the things you want to discuss?"

A Anybody that wants a hearing we would let them present what they felt they had to.

Q On what subject, on whether he's alive, isn't that it?

A The circumstance surrounding the individual, yes.

Q Let's be more precise than that. Are you interested --

A We're interested in trying to know what happened to him, is he dead or alive.

THE COURT: Supposing you looked at the report and you considered the passage of time, the fact that everybody that had been known to be alive, came home, all of these other factors, and the way the man went down. You arrived at the probabilities that it was 50-50, considering all these factors that he was alive, in the usual case, let's say, 50-50 chance that he was alive. Would you mark killed in action, or carry him as missing in action?

THE WITNESS: Sir, you're asking me specifically?

THE COURT: Yes.

THE WITNESS: This could pertain -- my answer might not be the same as someone else. In my case --

THE COURT: You know about it?

THE WITNESS: Yes, sir. In my case, based on what I've done over the years in the experience I've had, I would have to generally say on a 50-50 situation, that I would say the passage of time being a big factor, would probably say he's dead.

THE COURT: No, you misunderstood me. Including the passage of time, when you figure all the passage of time and everything else, it's still 50-50. It's substantial indication that he's alive and substantial indication that he's dead. When you put it all on the scales, it comes out 50-50, and that includes the passage of time and everything else entered.

THE WITNESS: Well, we have to make -- we would have to make a recommendation to the Secretary of the Airforce.

(Continued on next page.)

DIRECT EXAMINATION

BY MR. FOLEY: (Continued)

THE COURT: I know.

THE WITNESS: The recommendation would probably be deceased.

THE COURT: Deceased 50-50?

THE WITNESS: YEs.

THE COURT: Suppose it's 51 percent that he was alive and 49 percent that he was dead? This may sound funny --

MR. FOLEY: No, it's not, it's fascinating and I'm very interested.

THE COURT: What would you do?

THE WITNESS: Sir, personally speaking, if it were myself, based on everything, 51, I don't know how we can arrive, but say we did, probably to continue him in a missing status. I don't know until I can look at the thing.

THE COURT: In other words, in technical, legal terms, you would say the preponderance of the evidence would have to lie with the person who was trying to establish that he was alive, the burden of proof would be, as we say, civil burden of proof would lie on the person seeking to show life.

Gratch-direct

MR. FOLEY: I would be willing to accept that as a stipulation if the Government would be prepared to agree to it.

THE COURT: Who is here from the Navy that does this kind of work?

MS. BUCK: Commander Colgan.

THE COURT: Commander Colgan, what would you do on a 50-50 situation?

MR. COLGAN: You're looking at it with legal training. I'm looking at the cases, a Naval aviator, 24 years of experience flying airplanes, and all of our air crashes, I don't think he could make a hypothetical case.

THE COURT: I understand that. Suppose we did have such a case; that is he had -- let's assume the situation where he had a girlfriend who is a Vietnamese, he was knocked down at that place, carrying perfume. Let's assume so.

MR. COLGAN: If he had a girlfriend and perfume, I say he went over the hill, he's AWOL rather than missing in action.

THE COURT: Let's assume it's a 50-50 situation, for whatever the evidence, what would you do?

MR. FOLEY: If I may, your Honor, I could give you

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a specific case that would clear this up.

MR. COLGAN: You're saying, as I understand it, because there's one thing I find hard to do, first of all, the reason I have my job is because I'm a tactical air pilot, a special assistant of the Chief of Naval Personnel for POW-MIA affairs for the Chief of Naval Personnel. Since all our cases are aviators, we established this office. I would have to take a look at everything concerning the aviation.

THE COURT: I understand that. Putting all your expertise in the scale, the time, everything else, you come up and say this is a 50-50 case.

MR. COLGAN: I would have to say the passage of time would be preponderance --

THE COURT: You put that in as an extra factor. Can't you conceive of a situation where with all the passage of time and everything else, there's evidence the other way sufficient so when you get finished it's 50-50?

MR. COLGAN: I would think in a 50-50 case, I would have to lean towards a presumptive finding of death, and knowing I'm not making a determination of death.

THE COURT: I understand, you're not killing the man.

MR. COLGAN: Presumptive finding of death.

THE COURT: Fifty-one percent, what would you do?

MR. COLGAN: Leave the man in his current status.

THE COURT: Who is from the Marines?

MAJOR MARSHALL: Major Marshall.

THE COURT: What would you do?

MAJOR MARSHALL: I was out for a few moments.

THE COURT: You didn't listen for the hypothetical?

MAJOR MARSHALL: The time involved is an important consideration.

THE COURT: Considering the time, when you get all finished, considering the time, all the factors, pro and con, it's a 50-50 chance he's alive. Just right down the middle, what would you do?

MAJOR MARSHALL: Continue him on missing status.

THE COURT: Continue him MIA.

We have the army, navy. Where is the army?

MAJOR ENGLAND: If it was 50-50, I would recommend he be continued under missing status.

MR. FOLEY: They just went 50-50, Judge.

THE COURT: How far down the line would it have to go before you drop him into the killed in action?

MAJOR ENGLAND: Taking all those factors into consideration, you come out with 50-50 equation, if the passage of time cranked into the equation at that point made 50-50, the passage of time later on, another year --

THE COURT: That's another problem. I'm talking about now. Cranking it all in, what does it come out?

MAJOR ENGLAND: How long would I be willing to consider?

THE COURT: Just now, as of today, it's 50-50, how do you decide, MIA or KIA?

MAJOR ENGLAND: MIA.

CAPTAIN VOHDEN: I work in the office of the Secretary of Defense. All the reviews come from my office. On a 50-50 case, the men would stay in missing status. I would absolutely insure that would happen. The evidence would have to be very overwhelmingly in favor of the man being dead before a status would be changed.

THE COURT: You review these things?

CAPTAIN VOHDEN: Yes.

THE COURT: Supposing it was 49 percent he was alive and 51 percent he was dead, how would you carry?

CAPTAIN VOHDEN: Probably carry him in a missing status for a while.

THE COURT: You would require clear and convincing evidence of death before you would allow a change, at least?

CAPTAIN VOHDEN: Yes, sir, I would.

THE COURT: Are you a lawyer?

CAPTAIN VOHDEN: No, I'm not a lawyer.

THE COURT: You know what beyond a reasonable doubt is?

CAPTAIN VOHDEN: I don't know, but I'm convinced in my mind the man is dead. The law says you can reasonably presume the man is dead based on intellect of what reason is.

THE COURT: You would require considerably more than a 50-50 chance before you changed the status?

CAPTAIN VOHDEN: Yes. In the war, prior to 1973, the Department of Defense, it was less than 50-50 because we didn't know. As a result of this, we carried these men in a missing status, even though there was a question, even though the preponderance in many cases was that the man was dead, and we kept him in a missing status.

MR. FOLEY: For the record, I will say this, I would want to go over that testimony later on. I thought it was interesting and worthwhile pursuing.

THE COURT: If you want to swear the witnesses, we can swear them now, but I don't see it's necessary to swear high officers of the army and navy on this point.

MR. FOLEY: I'll take a second, if I may, to collect myself.

DIRECT EXAMINATION

BY MR. FOLEY: (Continued)

Q Captain Vohden has just discussed the fact that during the war there was more of a tendency, as I will attempt to paraphrase what he said, and you heard what he said, so don't take my word for it, but there was something of a tendency to be more inclined at that time to declare a person continued in missing status than there is today. Is that your understanding also?

A Yes, sir.

Q During that time, would it be fair to say that the man would not be declared dead unless somebody could show there was reason to believe he was dead?

A No, I don't believe it would be fair to say that.

Q How would you like to put it, what kind of belief would you have to come to before you declare him dead during the war?

A Of course, return of remains.

Q That's a pretty good reason.

A That's a pretty good reason.

Firsthand, eye witness statement, for example, that could attest, a wing man, that he was going down, the canopy was still on the airplane, never came off, a picture of an individual with bullet holes in his chest on the ground.

Q All of these are good reasons to believe he was dead?

A Yes, sir.

Q That's what I meant by the question. During the war, would you have to have good reason to believe he was dead before you declare him dead? That was the question.

A Yes.

Q You have to have just as good reason now to believe he's dead?

A We didn't have the passage of time. We should add a new factor in there. We're talking about before the passage of time is very important, plus the fact our men were still over there. We had not released anyone yet.

Q So, in other words, the passage of time, because of the passage of time, you don't need as much reason to believe otherwise he's dead, apart from the passage of time?

A I would say that's probably as right.

Q You were about to say something else. Maybe we ought to pursue this. I think it would be helpful. You mentioned something about we still had men over there, hadn't released.

A I said that?

Q I thought you said that.

A I didn't say that. I'm not aware of that if I did.

Q So many New York lawyers sidewind into subjects, perhaps. What I'm coming at is this, is the fact that the returnees have been returned, debriefed, give the information that they did, is it a factor in this changing that you've just described of how much convincing you need to declarea man dead?

A Yes, sir, that is a fact.

Q Is that based on any assumption on your part that the returnee, POW knew everybody else that was over there, or knew of them, knew everybody else, the identity?

A You know, the answer to your question, it's probably better --

Q Don't tell me what's better. Don't give me any of that business. I'm just asking you -- this business of trying to bring in other people, I know what you're after. It would be very highly improper on the record. I'm asking you of your view, you're the one who is the expert here. Could I have the question read back, please?

(Read back.)

A Yes, sir, I think they had a good system, reported favorably over the years of our members.

Q I want to ask you this. Is it your understanding the returning POWs did in fact know the identity of all of themselves, each other?

A (No response.)

MR. FOLEY: Strike the question. There's an intervening question that will help clarify this.

Q Is your feelings on this matter based on any record with respect to a communication system that existed between POWs when they were in the Hilton, or the zoo, wherever they happened to be, rapping on pipes to get in touch with each other?

A Yes.

Q In communicating the identity of each other to each other?

A That's correct.

Q Because of that, are you not saying that those who came out therefore had a good idea who the other guys were, they knew who was in and out of the particular systems they were in, is that the idea?

A Yes, sir, as far as I know.

(Continued on next page.)

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PIC/flp.

Gratch-direct

Q All right. I want to ask you this, in fact, were all of the men who came out known to the others as far as you know?

A I can't answer that question.

Q Let me put it this way, is itnot a fact there were some men who came out of the prison system that nobody ever knew they were there until theygot out or maybe a week or two before, many as long as nine years, that nobody knew about?

A Not in the Air Force.

Q How about Thompson?

You are aware of that case?

A I know the name, but I don't know the case.

Q There are some POW's kept in isolation and not known to other POW's until the war was over?

A Yes. We got all their debriefing.

Q You don't know how many isolated jails there were, you weren't there?

A No, sir, we have someone here that was.

Q He was only in one jail too?

A The fact of the matter is nobody knows how many different jails there were.

MS. BUCK: Objection. What relevancy does all this have?

THE COURT: It has some slight relevance, but let's move to something else.

MR. FOLEY: My understanding --

THE COURT: Do you have any questions of the witness?

MR. FOLEY: Yes.

THE COURT: Question him.

MR. FOLEY: Your Honor, this is a point --

THE COURT: Excuse me, do you have any questions of the witness?

MR. FOLEY: I wish to retain the right to ask him if the other witness we have been told about is not responsive --

THE COURT: Do you have any questions of this witness at this time?

MR. FOLEY: Not at this time.

THE COURT: Any cross-examination?

MS. BUCK: I have no cross-examination.

MR. FOLEY: May I?

THE COURT: Yes.

MR. FOLEY: We have had the file --

THE COURT: Excuse me. Ask your question.

(Pause.)

MR. FOLEY: Your Honor, the question that I need to ask I need a file to ask it. The third Bosiljevac file.

THE COURT: Is there a --

MS. BUCK: That is the DIA file that is a highly classified document.

THE COURT: Where is it?

MS. BUCK: Ft. Hamilton with a DIA agent. Neither I nor Mr. Foley are cleared to see the file. However,your Honor can see it in camera with the agent.

THE COURT: Have him here 10:30 Friday.

MR. FOLEY: Are we all done?

MS. BUCK: We are not producing him asa witness, just to produce the document.

THE COURT: Yes.

Next witness.

MS. BUCK: I wonder if you can take Commander Colgan because he's going to Vietnam.

MR. FOLEY: Fine with me.

THE COURT: Yes.

MR. FOLEY: Can I pick up that thing tomorrow with Colonel Gratch?

THE COURT: There is not going to be a tomorrow.

MS. BUCK: Colonel Gratch is also going to Vietnam.

THE COURT: I don't think we need him.

MR. FOLEY: I can't put it in one question.

THE COURT: I am sorry, let's proceed.

COMMANDER JOHN G. COLGAN, a witness called herein was sworn by the clerk of the Court and testified as follows:

THE COURT: Commander, before you sit down, did you hear the testimony of the last witness?

THE WITNESS: Yes, your Honor.

THE COURT: Do you disagree with anything he said?

THE WITNESS: No, sir.

THE COURT: Would your testimony be the same?

THE WITNESS: We do have a different procedure in the Navy.

THE COURT: Sit down and tell us what the differences are, please.

DIRECT EXAMINATION

BY MR. FOLEY:

Q Would you tell us, as the Judge said, what the differences are in your procedure in the Navy?

A In the Navy when we send a letter informing the next of kin of a hearing, when the next of kin arrives in Washington, D.C. for the hearing, the hearing is conducted by a single military officer.

I am the appointed hearing officer for the United

States Navy right now.

After the hearing is accomplished, then the case file and any attachments that the next of kin or their attorney want to ask about are then sent to our Board of Review. Our Board of Review consists of three combat Naval aviation officers who must have combat experience, and mustbe familiar with the airplane involved in the incident.

They then make a decision. They do not sit together, they sit individually, and they make their conclusions whether a presumptive finding of death or to continue the man in the current status.

From there the case goes over to the Secretary of the Navy after it is through with the legal section to see everything is proper.

Then it is sent to the Secretary of the Navy. From the Secretary of the Navy it comes back over to his designee. The designee issues the presumptive finding of death. That is how we differ from the Air Force.

Q As far as the testimony that Colonel Gratch gave about who can and cannot get files and who can and cannot participate and who gets cut off if somebody else in the family doesn't want them to go further, are all those procedures the same in the Navy as they are in the Air Force?

A Yes.

In accordance with the law 37, 551, 558, we would offer the hearing right to the primary next of kin.

I would like to say something in addition. As you know, as a result of McDonald against McLucas, we were only supposed to issue hearing rights to the primary next of kin receiving --

Q I would object to your saying I know that because I disagree with it.

A In addition to that, this might clear something up, there was a memorandum -- I don't have it with me-- it was signed by John Maury, and I believe the date was 1974. It was a fact sheet for all senators and members of Congress.

In that case, the file that went up -- there was a sheet in there entitled Fact Sheet on McDonald against McLucas. In there DOD published they would extend past what McDonald against McLucas required and they would offer hearing rights to primary next of kin and so parents can be protected -- and I could mail it out to you when I get back to Washington--

Q Other than the description by Colonel Gratch where there is a conflict betweennext of kins,who prevails and who can exclude who, it's the same in your branch of the service?

A Yes. Of course, we have to follow the rights of the man. When a man goes missing or is a POW, he is assigned to the Chief of the Bureau of Navy Personnel. We offer the hearing rights to the next-of-kin. His primary next of kin.

If we have a family situation, and it's a good family situation -- which thank goodness most of them are-- we would ask the wife, do you have any objection to your mother-in-law and father-in-law attending the hearing. She would be the one to ask.

Q If she said no, it's no?

A It would have to be no.

Q . If she said she didn't want to have a hearing and they wanted to have a hearing?

A There would be no hearing.

Q If she said, half way through the particular hearing, that she was unhappy about the way they were pushing for the man and she wanted less pushing and asked you to shut them off, you would shut them off?

A After she invited them to a hearing?

Q Colonel Gratch testified --

A If they had something to present and she said, I want my mother-in-law and father-in-law at the hearing -- you have an attachment to my affidavit, my hearing guide that I use and you also have the rules and regulations drawn up by the Judge Advocate General, that is signed by Secretary Mittendorf. I would have to see it gets into the record, that is my duty as the hearing officer, -- if they had something substantial.

Q I started asking Colonel Gratch something and you can perhaps help us. If somebody intends to come to a status review today, this week, or in the near future, for the purpose of opposing the status change, what do they have to show you?

A What do they have to show me?

Q What are you looking for?

A Let me tell you how we conduct the hearing. You will know that they are going to come to Washington. I recommend they inform me when they are coming into town. If possible we get them a place to stay.

I recommend they come to my office at 8:00 o'clock in the morning. If they come with their attorneys we have the whole morning to review the case file and since there is so much information in the file concerning aircraft, and most people don't understand jets and time delays --

Q Would you say most families?

A I know they don't.

Q Most of them I know do.

A I am there to provide any technical information. I set the hearing for 1400. We go in and tape the complete hearing and my hearing guide is attached to the affidavit and

I follow that. That tells what we are trying to accomplish at the hearing.

(continued next page).

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Colgan-direct

Q I ask you the question, if somebody comes down, do you ask them what they are looking for, for them to show you?

A Yes.

Q What do you tell them?

A In the original letter we also include a copy of the Secretary of the Navy's rules and regulations for conducting the hearing. We get that initially and that lays out what kind of information they should bring into the hearing.

Q What kind of information?

A Information where they are there to discuss -- can we reasonably presume the man is still alive. Do you have anything to show he is alive.

Q Isn't that it?

A Yes.

Q If somebody comes and tries to talk about something else, would you in fact shut off the hearing?

A I would ask them to submit their remarks in writing and if they have objection I should listen to an objection they have. It's not an argumentative procedure.

Q Did you get a phone call within the last ten days from a man in Connecticut named LeGrand Cole? He lives in Danbury, Connecticut?

A Yes.

Q Did you tell Mr. Cole on the phone if he came into the office to discuss anything other than whether the man is alive or not you will shut the meeting off?

A No. Can I explain?

Q We ought to be careful about that.

A He asked could he come in and could he object to the whole hearing procedure and the laws surrounding it. I said that would not be a proper thing to talk about.

Q Is your recollection very clear about that conversation?

A I think that is what I said.

Q I want to know how clear your recollection is of that conversation?

A Yes.

Q I think at this point I must warn you of something --

MS. BUCK: The witness answered.

THE COURT: Was it taped?

MR. FOLEY: I am not sure, it might have been. I have no hostility to this man.

THE COURT: Let's move to something else. I don't want this any further, let's move ahead.

Q Apart from your testimony here -- apart from

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the changes you have made in the testimony -- let me withdraw that.

Apart from the matters that you have alluded to here now, would it be your testimony that the status review procedure and the availability of documents and everything else in the Navy is the same as Colonel Gratch said is in the Air Force?

A Take a look at the folders, you will see that there is a difference.

Q What is it?

A If you look at Mr. and Mrs. Brooks' folder on their son Nick, which used to be the classified and declassified folder, now just the one because of the majority of the documents that are all declassified -- on the lefthand side of that folder we keep anything that is classified with a cover sheet.

Q You put two of them in and you cover up one so the people can't see?

A It's only one or two sheets.

Q It varies?

A We take out over the years certain things. There has been correspondence between the Navy and the family. There is a letter from a congressman. We take that out and don't keep that in the hearing file. Everything in the hearing file is what pertains to the man.

Q If you have an M.I.A. that had a garage sale and somebody put it in the file, you would take that out? His wife's garage sale wouldn't pertain to whether he was dead or alive?

A I don't know why I would have something like that.

Q Your testimony was that the majority of the stuff has been declassified. Getting back to something that Colonel Gratch said, when all the sanitizing and excluding and declassification is done, those folders still have the two sides, little bitty portion classified and the bulk that is on the other side, is that about right?

A No, we have many of the folders that have no classified material left.

Q As to the situation where there is classified information, it remains classified, is it available to the people participating in the status review and is it reviewed by the people who review the file and make the status change?

A If there are people at the review, namely the mother and father, or the wife, then we would have to take the classified information and to protect any sources of collection methods, we would have to take that out.

Q Just sources, names of guys that were spies?

A The only thing we have to protect is the source and collection method.

Q Are you prepared to swear now there is nothing else in there except the name of sources, Vietnamese, that gave the information?

A Let me tell you what happened. I relieved Captain Frank Rush in January of 1975 on the job. And at that time he started declassification.

Well, I went out and got an officer brought on active duty who is now with me a year and a half whose primary job is to declassify.

I am sure you're probably aware of all the rules and regulations and laws of the country. I received declassification authority from the Navy that entitled me to take care of Navy matters. I have the authority to declare any Navy matter, like Colonel Gratch has. With documents that originated by other organizations within the Government, I must go to that particular organization and ask them to declassify the document. Sometimes, even though they can't be declassified, they have been cooperative and they will sanitize it protecting the source.

I have never seen anything taken out concerning the man's casualty.

Q You either are or you are not prepared to

Colgan-direct

testify now under oath that there is nothing but the name of Vietnamese who gave information --

A And different collection methods.

Q We have some reference and testimony about a thing called Red Crown, are you free to talk about that?

A Yes.

Q I don't want --

A Red Crown was a call sign for a Navy ship in the Gulf of Tonkin. It was a Tiraz ship, positive identification radar advisory. All during the war the Navy was up there 24 hours, around the clock, and we kept Barcap --

(Continued on next page.)

Q You better explain what barcap means?

A Barcap is Barrier Air Combat Patrol. Now, every Navy mission took off from the carriers. And we usually had three carriers on the Yankee station at all times.

Q The Yankee station is what?

A The Yankee station was the carrier stationed up in the Gulf of Tonkin. Every Navy mission, every flight leader would check in with Red Crown. And he did exactly what he said.

Q Just Navy flyers?

A Just Navy. Because we were coming from the ships. It was a Navy organization along with the Piraz. The crews are on the station. We had a destroyer sitting over by the beach, and they provided rust caps, helicopter rescue. Helicopters continued to go in and pick people up.

Q Just a minute. The testimony here is that Captain Bosiljevac was in the AirForce, that there were tapes involving communications with Red Cap from him. Is that possible? Are we talking about -- the Red Crown rather?

A Red Crown. I found that yesterday. I don't know. You know, how that came about -- I wouldn't want to comment, but it would seem to me that for the short range emergency radio that we carried, even if you were right on the Vietnam Coast line, I guess if the atmospheric conditions were right, transmission could be picked up. It would seem that that would be the line of --

Q This is Red Crown that you are talking about?

A Yes, that's right.

Q Ok.

THE COURT: Is there anything else from this witness?

MR. FOLEY: I have one more thing, Judge. I thought somebody had spoke.

MR. BRADLEY: Yes, I did.

Q The Judge asked you some questions when you were in the audience here with respect to what you might do in a fifty-fifty situation. I am sure the record will reflect it. And I am sure you recall it. Of course, now being under oath, you adopt those answers as your testimony?

A Yes.

And since I am under oath, I would like to add something. I guess, you know, with my -- what I have been doing for the past quarter century, I find it very hard, your Honor, to add everything up in this business and put the time element in with everything else that I know. I guess my mind is not trained to do that. I try to look at the casualty of the man and circumstances surrounding his airplane.

I would like to point out to everybody that we are sitting in this courtroom talking aboutthese cases. Please don't forget, these airplanes were moving 450 to 500 knots when these things were occurring. So, you know, we just --

Q I think that is a very important point.

A It really is.

And in everything concerning this, when it comes to the aircraft casualty, so that passage at time really sticks in my mind because --

Q Let me ask you about that 400 to 500 knots. Sometimes faster, is that not true?

A Sometimes faster.

Q Sure.

And didthat have any particular impact on the ability of people to see what happened to a fellow? In other words, let's put it this way. Wereyou familiar with the -- a returnee named Cogar?

A George Cogar?

Q Right.

There is particular reference,some statement of his that I would like to put to you and ask you if they apply.

THE COURT: I don't want to get into this.

MR. FOLEY: All right.

THE COURT: This is not a war story.

MR. FOLEY: No, I don't intend it to be.

THE COURT: Anything futher of this witness?

MR. FOLEY: Yes, I do.

Q Getting back to this 50-50 and 49-51 particular situation, you have a POW in your files named Ronald Dodge, is that not true?

A That's true.

Q And Ron Dodge's picture I believe was published after he was captured? I believe it was what? On the cover of Life Magazine?

A Paris Match.

Q Paris Match. That's right.

Now, that was a photograph of an American --

MS. BUCK: Objection. This man is not a plaintiff in this lawsuit. I believe his family has the right to privacy and they --

MR. FOLEY: I am not invading his family's privacy it was on the front cover of Paris Match.

THE COURT: What happened to the man? Was he returned?

THE WITNESS: No, your Honor. He is still carried in POW Status.

Q Isn't he presently scheduled for status review?

THE COURT: I don't want to get involved in this.

MR. FOLEY: I would like to know in a case like that if --

THE COURT: No. Anything else.

All right, you are excused.

MR. FOLEY: I inquire how his case would apply to your 50-50 analogy.

THE COURT: I don't want to get involved in it. Anything else?

Q Otherwise, you agree with what Colonel Gratch testified to?

A I think to the best of my recollection of his long testimony, I would.

THE COURT: All right, any cross-examination?

MS. BUCK: I have one question.

CROSS-EXAMINATION

BY MS. BUCK:

Q Are you familiar with the Brooks file?

A Yes.

Q Did you ever have occasion to go over that file with Mr. Brooks, the father?

A Yes. I think Mr. Brooks and Mrs. Brooks. I think we reviewed it at four different National League of Families Conventions. And the dates are on the inside of the cover. I don't recall them exactly right now.

Q Do you yourself put the date down?

A I do.

Q Do you put anything by the date?

A Just who I reviewed it with and the date.

MS. BUCK: No further questions.

THE COURT: All right, step down.

MR. FOLEY: I have a further --

THE COURT: No.

MR. FOLEY: Your Honor, this is a very important question.

THE COURT: Step down, Commander.

(Witness excused.)

MR. FOLEY: May I just put an offer of proof on the record because I feel it is this important. I want to examine on that particular matter to see what the changes were in that file on that date. I would like the record to reflect that I wanted to pursue that.

THE COURT: All right.Who do you want to call?

MR. FOLEY: Anybody else?

THE COURT: The Marines?

MR. FOLEY: The Marines.

THE COURT:Marine Corp.

All right, swear the witness.

MAJOR NAT J. MARSHALL, called as a witness, being duly sworn, by the Clerk of the Court, testified as follows:

THE COURT: Now, Major, what do you follow, the Navy or Air Force or something individually?

THE WITNESS: I follow the Navy. We are both --

THE COURT: All right.

THE WITNESS: Navy Services. We have to stick together.

THE COURT: All right, do you agree with that? Is there any clarification you would like to make with respect to what you heard the Commander say with respect to your method of operation?

THE WITNESS: No, sir.

We are both under the Secretary of the Navy and our procedures are identical.

THE COURT: All right, any questions?

DIRECT EXAMINATION

BY MR. FOLEY:

Q You have heard the testimony of Colonel Gratch?

A Yes.

Q Having heard that testimony, are there any differences in your procedures other than those that Commander Colgan testified to?

A Not that I can recall.

Q What you are saying, then, is that your testimony would be substantially the same in those regards as was

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Marshal-direct

Colonel Gratch's?

A Yes.

Q I see.

Can you tell me this. Yougave some testimony off the stand a while ago in the courtroom with respect to what you do in certain situations that the Judge proposed to you about the 50-50 percent and the 49-51 percent and things like that? Do you recall that?

A Yes.

Q And you adopt that as your testimony now, would you not?

A Yes.

Q Now, I would like to ask you, do you recall that disagreed with some of the other persons out there? It was my recollection that of the fourservices, two of them are in a 50-50 situation and would go for a determination of death, and two would not, and I think you were for life, weren't you?

A Yes.

Q Commander Colgan was not.

Is that just sort of a subjective difference that you two would have or is there a reason for it? Anything in your rules or regulations or any other reason that you can describe why you would have that different reaction?

A It was basically our own judgment at the time the question was posed. I know of no regulations specifying the exact standards formaking recommendations concerning a person's status.

Q You do it on the basis of your subjective reaction to what you see there?

A Yes.

Q And case by case basis?

A Yes.

Q You have no fixed criteria to apply to all cases?

A No.

THE COURT: Any cross-examination?

CROSS-EXAMINATION

BY MS. BUCK:

Q Could you tell me what factor you consider when you make a determination?

THE COURT:Do you want to get into all of this?

MS. BUCK: Your Honor, in his question.he talked about subjectiveness. I just want to point out, I don't think the witness understood -- or maybe I misunderstood what he is talking about when he is talking about subjectiveness.

THE COURT: No, I think I understand.

MS. BUCK: All right, fine.

THE COURT: Thank you very much Major.

(Witness excused.)

THE COURT: Now we have the Army, last but not least.

MAJOR WILLIAM L. ENGLAND, JR., called as a witness, being duly sworn by the clerk of the Court, testified as follows:

THE COURT: Now, who are you closer to, the Air Force or the Navy?

THE WITNESS: In respect to what, your Honor?

THE COURT: Procedures.

THE WITNESS: Well, we are --we have our own procedures. They are substantially the same as the Navy's.

THE COURT: In what respect are they different?

THE WITNESS: The only respect to which they are different is in notifying -- in granting the right of a hearing. Notice and hearing rights to next of kin. In the Army we provide rights for notice and hearing to any persons who are currently drawing Government benefits, or any primary next of kin, whether they are drawing Government benefits or not. But we do not provide notice for hearing rights to secondary next of kin who are not currently receiving Government benefits.

THE COURT: If there was a wife drawing benefits

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and the parents living, and the wife waived the hearing, you would not give the parents a hearing if they asked for it?

THE WITNESS:That's correct. We would not.

MR. FOLEY: Your Honor, there is a copy of a notice of motion around here somewhere that I had pulled the staples out and I can't get it. The one I have now is loaded with staples.

Please read back the last answer.

The documents are somewhere. I can't locate them.

THE COURT: All right, is there anything further?

MR. FOLEY: I am going ahead. I can't find the document. I just wanted to know what he --

THE COURT: He just testified there were no hearing rights to secondary next of kin drawing benefits.

DIRECT EXAMINATION

BY MR.F OLEY:

Q Under any circumstances; is that correct?

A That's correct.

Q Ok. Apart from that, if you -- you heard the testimony of Colonel Gratch with respect to files and how they are maintained, and what is available and other matters like that that he testified to today?

A That's correct.

Q The various procedures in the Air Force that lead you to a status review?

A That's correct.

Q Would you say that his testimony applies with equal vigor to the Army, with the exception of this change you just stated, namely, that other than primary next of kin, no one else is allowed in?

A As a matter of right, that's correct.

Q All right. That's what we are talking about.

The next of kin that you say are allowed in as a matter of right are not primary next of kin, but next of kin receiving Government benefits; is that correct? No matter whether they are primary or secondary?

A Whether they are next of kin or not, they are currently drawing Government benefits, they are entitled to notice of hearing.

Q Regardless of whether they are next of kin at all?

A That's right.

THE COURT: Is it possible two different people are drawing benefits like parents and wife?

THE WITNESS: Yes.

THE COURT: And then both of them would have a right to appeal?

THE WITNESS: That's correct.

England-direct

Q Are theremany cases like that?

A We havesome cases where more than one person is currently receiving Government benefits. That's right.

Q Colonel Gratch gave some testimony with respect to the manner in which-- not the manner -- gave some testimony with respect to some rules and regulations?

A Yes.

Q Now, I notice attached is some papers here. This is AR600-10. Is that it? Is that where the regulations are all to be found?

A For the Army?

Q Yes.

A That's correct.

Q Are there any more such as directives or letters or anythingelse that go beyond what is in there?

A Nothing other than the statute Title 37.

Q But you don't have letters of a couple of weeks ago that alter the rules in any way?

A No.

Q That's it?

A The information that is in our letters is incorporated in AR600-10.

Q I see. That is it.

MR. FOLEY: I have no further questions of this witness.

THE COURT: I take it, Major, that if a hearing were waived by the beneficiaries, you would still go to the file, and if you determined that at least the probabilities came to light, you would carry the person as missing in action?

THE WITNESS: Yes.

We would still conduct a status review.

Just that if there was a waiver in connection with that status review. That is a right that the next of kin or that those currently receiving Government benefits would have a right. They waive the right, we would still conduct a status review.

MR. FOLEY: Judge, there is one other way I think that there is a difference.

DIRECT EXAMINATION

BY MR. FOLEY: (CONTINUING)

Q How about the record that you forward at the review?

My record in reading the regulations is that what you forward is the summary of the proceedings, the summary of the casualty event, objections and a few things like that, but not the whole file; is that correct?

A That is not true.

Q All right. Then I made a misconception.

THE COURT: Thank you, Major. Thank you very much.

15 (Witness excused.)

THE COURT: Who else do we have on the Government's side that we haven't called?

MR. FOLEY: There was supposed to be somebody here from the Finance Office.

MS. BUCK: He's not the -- he can explain who he is.

THE COURT: All right.

MR. FOLEY: Captain Boden, there is only one question that --

THE COURT: Excuse me, do you want the Captain to testify on your behalf?

MR. FOLEY: Not on my behalf.

I have asked that all these witnesses be declared hostile witnesses because --

THE COURT: Do you wish the Captain to testify in your case?

MR. FOLEY: I wish to have them present anybody who can answer that question that was not answered before, namely --

MS. BUCK: The financial question?

MR. FOLEY: The financial question.

MS. BUCK: All right, Captain.

MR. FOLEY: That is all I have to ask.

THE COURT: All right, take the stand.

MR. FOLEY: I have absolutely nothing to ask.

RAYMOND A. BODEN, called as a witness, being duly sworn by the clerk of the Court, testified as follows:

THE COURT: Yes, Captain, take the stand, please.

MR. FOLEY: Your Honor, we are at a bit of a loss here because we made a note of -- I have a reference here on the record to find out what it was, but when we covered the matter of irreparable injury, the difficulty we encountered was that there was one end of it that the witness -- we were told to ask somebody else because apparently a financial expert witness-- I don't know the --

THE COURT: Irreparable injury on the issue of benefits comes in two parts. First, after the man is declared dead, you start putting the pay that -- if it isn't paid over to his beneficiaries -- then to his savings account.

THE WITNESS: Yes, sir.

(continued next page)

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DIRECT EXAMINATION

BY MR. FOLEY: (Continued)

THE COURT: If he should return later as a living person, would he get the amount of money that would have been paid in from the period that you stopped paying until the period he turns up?

THE WITNESS: Yes, sir, he would get all of his back pay allowances and all the money that would have normally gone into this 10 percent fund. He would get that, also.

THE COURT: Plus 10 percent interest?

THE WITNESS: Plus the 10 percent interest.

THE COURT: That's the first part of it. The second question is as to that portion that had been paid in while he was in the missing in action status and which upon his being declared in the status of killed in action would then go to somebody. If he should return and if the wife -- if there should be a falling out and if he should want to get that money back, what if anything would the service do for him?

THE WITNESS: As far as I know, there is no absolute, mandatory obligation from the Secretary to pay this money, but he has this under , I guess 556D. He has the authority if he feels in good conscience or justice, or whatever, he has the authority to pay this money, but as far as I know, he does not have the absolute obligation to pay that money to that man before.

THE COURT: Even if it would mean double payment in a sense?

THE WITNESS: As far as I know, he's not obligated to do that.

THE COURT: He could do it?

THE WITNESS: Yes.

Q Is it discretionary, is that the idea?

A I think the word, say "May."

Q You testified the 10 percent interest during the intervening period when he was in kill status would be paid for that period of time. Is there an absolute legal obligation for them to do that, and the same way as you discussed about the other thing, too, or do you know?

A As far as that's concerned, I can give you one instance. There were 9 men in similar categories like that during the war. One man, and I know specifically, is a Sergeant Ridgeway. He was declared KIA in 1968. He came home in 1973 and at that time when the Vietnamese released the names of the prisoners, everyone was surprised they found out that he was alive. He received all of his back pay and allowances. He received interest at 10 percent as if it would have been put in the 10 percent had he been MIA. He received all of his promotions. He received reenlistment bonus which he would have received. His pay was based on his promotions in addition. He was paid for all unused leave in addition.

I also have a commitment on behalf of the Secretary of Defense that if this situation occurs again that these men would get paid.

Q The question I asked you goes to this distinction that you drew between must and may.

A Right now the situation after -- if a man goes MIA to KIA, after that point, he will get it, and this I was told and I can give you this in writing from the Secretary of Defense that these men will be paid the interest on their 10 persent fund. Prior to that time --

THE COURT: That's enough.

Any other subject?

Q When a man is declared dead, there is a distribution of his assets; is that not true?

A Yes, sir.

Q Do you know of any way a recapture of those assets for him can be affected?

THE COURT: That's a different problem.

Obstained.

MR. FOLEY: You will not permit that question?

THE COURT: He's not qualified. He's not a lawyer.

MR. FOLEY: I just asked him if he knew, if they had it. Then I have no further questions.

THE COURT: Thank you very much.

(Witness excused.)

THE COURT: You don't have any cross-examination of the Captain, do you?

MS. BUCK: No.

THE COURT: Do you have any further witness?

MR. FOLEY: There are two other witnesses, both of whom would be obtained by one, Mr. Seiverts.

THE COURT: And who else?

MR. FOLEY: A lawyer in Florida named Karen Martin.

THE COURT: What is Ms. Martin going to say?

MR. FOLEY: She is an MIA wife who will testify and an attorney who will testify on the difficulty -- she's also the only attorney who ever succeeded in a status review in recent years. She will testify on the unfairness of the procedure, the inadequacy of certain record keeping provisions , the cost of various features, another number of points.

THE COURT: Get her on the phone.

MS. BUCK: I would like to make it clear the hearing he's talking about, procedures and events he's talking about were at the end of year review that was conducted in 1973.

THE COURT: Is that pre - the Southern District case?

MR. FOLEY: --

THE COURT: Was it the pre-McDonald order?

MR. FOLEY: I have a feeling it was after. I'm virtually certain it was. During the McDonald order, there was a freeze on those things. It would have to be afterwards. In fact, I'm practically certain. That's not the point. The point is that she's going to carry things right through to now and to a surprising conclusion.

THE COURT: We'll hear her. She's not available now. We can't hear her now. Where is Mr. Seiverts?

MS. BUCK: The only number I have is an office number. I can try reaching him there.

THE COURT: Try it. Go into my office and try it.

All the uniformed officers can go home. Thank

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you, Gentlemen.

(Pause.)

THE COURT: It seems Ms. Buck cannot get the witness. We'll continue this case to Friday at 11:00 a.m.

* * * *

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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HOPPER, et al., :

Plaintiffs, : 77-C-1793

-against- :

CARTER, :

Defendant. :

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United States Courthouse
Brooklyn, New York

September 21, 1977

Before:

HONORABLE JACK B. WEINSTEIN, U.S.D.J.

DANIEL OLARNICK
COURT REPORTER

Appearances:

DERMOT G. FOLEY, ESQ.
-and-
JOHN A.K. BRADLEY, ESQ.
Attorneys for Plaintiffs

DAVID G. TRAGER, ESQ.
United States Attorney
for the Eastern District of New York

BY: ELAINE BUCK, ESQ.
Assistant U.S. Attorney

THE COURT: Mr. Sieverts --

THE WITNESS: Yes,sir.

THE COURT: Please speak clearly. We have a reporter here. We're taking this in chambers, but we have the public invited and counsel will address you. The first person you'll hear is the Clerk, who will swear you.

Swear the witness,please.

FRANK A. SIEVERTS, called as a witness in behalf of the plaintiff,having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. FOLEY:

Q Mr. Sieverts --

A Yes, sir.

Q Will you state what your position is, please?

A My title is Deputy Coordinator for Human Rights and Humanitarian Affairs, with the particular responsibility for prisoners of war and missing in action matters, in theDepartment of State.

Q How long have you been involved in the POW-MIA area?

A Since 1965.

Q Is that with the State Department during that period of time?

A Yes, always with the State Department.

Q Is it fair to say that you are the official of the State Department primarily responsible for dealing in this area?

A Yes, I think that's correct.

Q Do you report to a superior?

A My immediate superior is the coordinator for Human Rights and Humanitarian Affairs.

Prior to that, my superiors were the Deputy Secretary of State and the Secretary of State and our office still reports to the Deputy and Secretary of State.

Q Mr.Sieverts, were you -- did you accompany the Woodcock Commission to Hanoi?

A Yes, I did.

Q Can you tell us whether or not the Woodcock Commission received a Defense Department briefing in Hawaii on the way to Hanoi?

A Yes, there were -- there were really several hours of briefing in Hawaii, under the auspices of the Commander and Chief of the Pacific.

Q Have you had an occasion to see a document here which has been marked plaintiff's exhibit 26, which purports to be the text of that briefing with certain deletions?

A Well, I don't know if I've seen the written text, but since I was present, I've heard the briefing and I think I am familiar with what you're describing, yes.

Q You are aware that that particular text has become available to us recently, are you not?

A I understood it was requested and I certainly concurred in its relief to you, yes.

Q Were the -- when that -- you say that briefing lasted several hours?

A The overall briefing of which there were many parts -- I think the particular briefing that you're referring to is the one given by Colonel Matthews.

Q I believe that's true, yes.

A That lasted only about 15 or 20 minutes, I think that particular portion, perhaps half an hour.

Q There were additional briefings given; is that correct?

A There were also other briefings on Logistics and a variety of briefings were given at that time.

Q This particular briefing deals with the question of the appraisal by the Department of Defense of the ability of the other side to account for unaccounted four men; were there any other briefings given on that subject?

A No, I think that's the only one on that subject.

Q Do you know whether or not the State Department concurred in the Defense Department's position in this briefing or did they get to a point where that became a question?

A The State Department was not asked to concur or participate in that particular briefing.

Q Ok.

A It was an effort by Defense Department officers concerned to convey to the Woodcock Commission in a relatively compressed format the background information on various categories of American missing prisoners and killed in action. All the Indo China countries, by the categories that I think had been established recently for intelligence accounting purposes.

Q Yes?

A Those categories differentiated by the degree of information and the degree of likelihood that the Vietnamese would have that information or the other Indo China authorities and described the number of men and the kinds of cases that fit into each category.

Q Do you know whether, when you say the numbers of men and the kinds of cases, when they're discussing numbers, have they got specific men in mind for those numbers?

A Yes, I think those numbers are based, are summarizing overall total of specific men, that's right.

Q Who, the Defense Department was responsible for this?

A I'm not sure I can answer that.

Q The briefing was given orally by Colonel Matthews.

Q Do you know whether Rogers Shield (Phonetic) had anything to do with the preparation and organization of that briefing?

A Roger was also a supporting member of the [illegible]ck Commission. He was present, but I personally do not know who originated that briefing, no. It's a factual briefing based on information and analysis that had been circulating, I gather, for some time.

Q When you arrived in Hanoi, did you give the factual content to that briefing to the Vietnamese?

A No, there was no occasion of that, and I must say that was only one of the many briefings that the Woodcock Commission received and that was not the one that had the greatest impact on us.

It was important background information, but it did not take into account some of the elements of the situation that the Woodcock Commission thought were important.

Q The answer to the question is, then, that the information in this briefing was not given to the Vietnamese;

is that correct?

A These particular data were not conveyed, as such, to the Vietnamese, no, there was no occasion for that.

Q When you went to Vietnam on that particular mission, did you also take the files of the number of these cases?

A Yes, we did.

Q How many files did you take?

A Well, I don't remember.

Q Can you make an estimate?

A Perhaps 30.

Q Did you leave any of those files?

A On that occasion we did not leave files, no.

Q None whatever, not even one?

A That is correct.

Q When you used the words, "On that occasion," is that of any significance? Did you leave some of those files --

A We have a program of passing files to the Vietnamese, in which I've been personally involved. In that particular mission we brought the files along and considered passing them at that time, but the discussion was such that we thought it was more desirable to continue and resume passing files in connection with the establishment of a technical channel, which the Woodcock Commission succeeded in arranging with the Vietnamese. We've passed files subsequently to the Woodcock Commission trip, as we have passed files prior to that as well.

Q In other words, a mechanism has been arranged for the exchange of information about these men would be Vietnamese?

A That's correct.

Q And has this been established as part of any program or proposed program designed to achieve an accounting?

A Well, it's part of our overall and continuing effort to obtain more information about our men, and this device of providing files, which are coached in such a way to make it especially evident to the Vietnamese that information should be available on more specific cases, is one means that we are using to elicit such information.

Q How about the Vietnamese, do they reject these things or express indifference towards them?

A No, we've had some success, some responses on these files, not anywhere near as much as we like, but they have accepted files that we have provided and are continuing to accept files, and I anticipate bringing more files when we go to Hanoi next week.

Q Have they indicated to you, in other words, that they have a receptive attitude towards the possibility of furnishing us with information that could lead to an accounting?

A Let me put it more simply: They accept the files; there have been responses with information in the last few months which have covered the specific cases on whom we have provided information.

There have also been responses and information on men who have not been covered in these files.

Q So information is sort of coming in?

A Very slowly and in a limited way. We will find out when we go to Hanoi. They are continuing the process, we hope they are.

Q Have they indicated to you they have a process in mind for accumulating and furnishing information to you?

A They told the Woodcock Commission they would undertake renewed research efforts. They do so, of course, in the context of saying there were no American prisoners, no living Americans in Vietnam. These search efforts were for men who are killed, pilots who are killed and they would, however, continue and resume their efforts to recover the remains and they would then return, arrange to return the remains to the United States.

Q Well, now, this particular mechanism that they're setting up to search for and find these men, prior to the Woodcock Commission and prior to recent negotiations in Paris, did they not also make the statement, committment or statement, to the Montgomery Commission when they were there?

A I think that's more or less correct.

They are, after all, that committment dates back to 1973, and it alsodates back, really tothe Geneva Convention of 1949, to which Vietnam is a party, which also requires much the same accounting process following-an armed conflict.

So, the Vietnamese have committed themselves to do this. They did so in the Paris Agreement and have said they would do it subsequently, but as you know, as we all know, the actual results have been extremely limited.

Q Now, when you were in Vietnam at this time and in the Woodcock Commission, is it not true you actually met some of the people on this Vietnamese question?

A I'm sorry, I did not hear the end of the sentence.

". . . Is it not true . . ." that what?

Q That you and some of the people on the Woodcock Commission actually met with some of the individuals involved in these Vietnamese efforts?

A That's correct.

That's the way they were described to us.

Q Is it true also that you and they paid a visit to a cemetary in Hanoi when you were there?

A Yes, that's true.

Q When you were at that cemetary, is it true that a confrontation of some type developed between Roger Shield and the head of this Vietnamese delegation?

A I'm not sure I would describe it as a confrontation.

Q Just describe it --

A There were discussions that took place at that time between a number of us and a number of Vietnamese about further search efforts, where other Americans might be buried.

Q Well, would you just --

A (Continuing) -- this was the same cemetary in which other Americans might be buried. It was a question-answer process, as I describe it.

Q Would you describe this particular one? I don't want to know about a number of discussions. I think you know which one it is which is involved, Roger Shield and the individual who was presented to you as the head of this delegation or commission that the Vietnamese have.

Do you recall that?

A No, I'm afraid that I don't recall it that way.

I do recall at the cemetary that there was a number of informal discussions involving members of the Commission, Dr. Shields and myself, other staff members of the Commission and various Vietnamese, and this was the subject that I've just described.

Q Do you recall a situation where Dr. Shield said he could take them to a portion of the cemetary where he had been shown in the past Americans were buried and if they wanted to really account for these guys, they'd go right over and dig those guys up now?

A I personally don't recall that, no. I'm not sure that it was true that Roger was at that cemetary before.

Q Let me remind you, it might have been in May of 1973.

A I was in Vietnam in February of 1973 with Roger Shield.

Q All right.

A (Continuing) --for the prisoner release, but I don't recall that he was back in May of 1973. I don't believe that's correct.

Q Can you confirm whether or not after these discussions with the Vietnamese at the cemetary Roger Shield was more or less instructed not to push sohard?

A No, I don't think that's correct.

Q You don't know?

A I don't think that's correct.

Q You don't think it's correct?

All right. You have stated the North Vietnamese have told you, have made a statement that they don't have any Americans alive over there; do you recall that?

A They said that repeatedly.

Q Incidentally, do you know whether or not they made that statement to the Montgomery Committee also when they were over there?

A Well, I'd have to check the record. I would prefer to limit this to what they told the Woodcock Commission.

DIRECT EXAMINATION

BY MR. FOLEY: (CONTINUING)

Q Well, I wouldn't, because there's relevancy there --

THE COURT: Sustained.

Go to the next question.

Q Can you tell me whether there was an MIA or POW named Goggelman (Phonetic) that you know of?

A Let me say, there is a separate question about American civilians in Vietnam on which I don't believe the Vietnamese have been quite as explicit as they are about the prisoners from the conflict.

Q Will you please tell me now, do you know about Goggelman?

A Of course, I know about Goggelman.

Q All right, do you know whether or not the Vietnamese made a statement to Americans on a prior visit that they knew nothing about Goggelman or that they knew nothing about any other alive Americans there when, in fact, we now know Goggelman was alive and in their hands at the time?

A You're speaking of the time of the Montgomery Commission and, I think, you have to ask some one else about that, because I was not with that.

During the Woodcock Commission we made a special point of asking for Goggelman and about him and we were informed at that time by the Vietnamese that Goggelman had died in Saigon in 1976.

They gave us the date and subsequently provided the cause of death, but let me tell you that they're statements about not holding prisoners are clearly in context with the prisoners from the Indo China conflict.

On the subject of American civilians who stayed behind after 1975, the Vietnamese were less explicit and had said as the Woodcock Commission reported, tothe best of their knowledge all these Americans have left and we probed them on whether there were any remaining American defectors, deserters, people just hiding out, and they said, to the best of their knowledge, there weren't any, but they couldn't speak as explicitely as that -- as they could of American prisoners who were missing from the Indo China conflict.

Q Did they specifically state that they had less to tell about civilians than they had to tell you about military men?

A They said they were not able to make as categorical a statement about it; they referred several times to the fact that they are a large country with 50 million people and therefore they put it this way: All Americans and all foreigners who have registered have been allowed to leave, but if they haven't registered, and I suppose, in effect, go underground, they were not able to give a categorical statement about that.

Q Were they able to make that statement about civilians as well as military men?

A They made a much more categorical statement about military personnel --

THE COURT: Sustained.

A (Continuing) -- the prisoners -- there were no prisoners being held from the conflict; that they had either been released or died and that was that.

Q I'd like to ask you --

THE COURT: Go to another point.

Q I'd like to ask you about Arlo Gain (Phonetic).

THE COURT: Is he a civilian?

MR. FOLEY: I don't know.

A Arlo Gain was an American civilian.

THE COURT: Excuse me, I don't want any information --

A (Continuing) -- who was held as prisoner by the Vietnamese --

THE COURT: I don't want any information on civilians.

Thank you.

THE WITNESS: Yes, sir.

MR. FOLEY: If you give me a moment, I'll pick up the next point.

THE WITNESS: He's also been released.

MR. FOLEY: I think now I should be allowed to follow that up with one question --

MS. BUCK: Objection.

THE COURT: I don't want anything on civilians.

I don't want anything on civilians.

BY MR. FOLEY:

Q Now, can you describe what were the efforts that the Vietnamese said they were undertaking to make, to obtain additional information about the missing in action --

A They described these efforts as search efforts for the purpose of recovering remains.

Q That's all?

A That's in one -- in a short phrase, that's what it comes down to, yes.

Q Well, was that expanded upon? Did they describe it any further than that?

A Well, they described the type of search efforts, the fact that this involved going to different parts of the country, talking to the local population about American pilots and American aircraft being lost. They expressed the fact that the civilian population was often reluctant to cooperate, perhaps out of, I think what they described as a continuing resentment, that these were pilots who had bombed them and so forth, which they said was a problem or an obstacle they had to overcome in the search process, in the course of looking for the remains and any other indications of the aircraft. Passage of time has often obliterated all traces and even the memory of the people who thought they knew where a man may have been buried are proved to be inaccurate. They then describe specifically some of the problems they had and one of the most obvious one was that of Major

Eaton (Phonetic), the man in this case and Ai Shan (Phonetic) or the Vietnamese body which was returned to us by mistake. When we went back and discussed this specifically with the Vietnamese and asked about it, they expressed considerable dismay, because they maintained that they have spent a great deal of time finding those remains; they were sure that they were Major Eaton and it had already taken several weeks of apparently continuous digging and searching to find it.

They have continued the process since, without success.

So, I think, what I'm simply saying is: They are describing a process which, from their point of view is difficult and pain staking and perhaps often time consuming.

Q But ongoing; is that correct?

A Well, let's say we hope it's ongoing.

Q You're talking about --

A We'll find out in Hanoi next week.

Q You're talking about their description as pain staking, but they're describing it as an ongoing effort?

A They did describe it that way in May and June, but it's now been several months since June and there's no indication of further information or remains that's been brought to our attention.

In other words, we are now going to be receiving the remains of whom we were informed on the second and third of

June.

Q Now --

A (Continuing) -- as to whether it's still ongoing, we'll have to wait to see what they tell us when we're in Hanoi.

Q Now, the United States has had two sections in relatively recent months of negotiations with the Vietnamese in Paris; is that not true?

A Yes, the meetings in Paris took place May 3rd and 4th, and June 2nd, and 3rd.

Q Yes. Were these meetings -- at these meetings were there negotiations with respect to obtaining an accounting for the MIA?

A Yes, we had talks in connection with those meetings and during the meetings with Vietnamese officials responsible for the subject, and it was during those talks that they informed us of the 22 sets of remains that are being returned to us now.

Q Right. And -- now, is there an ongoing flow of information involving or in connectionwith those negotiations?

In other words, are you receiving information periodically?

A We would like to be able to describe it that way. Inpractice it consists of our providing information to the Vietnamese and then the Vietnamese occasionally responding with word on the recovery of additional sets of remains, and then, subsequently arranging to return those remains to us.

Q In addition to that,do you have an exchange with the Vietnamese that gives you some kind of an indication of how the overall negotations are going and whether or not they have a continuing interest in pursuing these negotiations?

A Well, the overall negotiations concern issues that go well beyond this case. The relationship between the U.S. and Vietnam, the question of aid and so forth and I don't think it's appropriate for me to go into that --

THE COURT: I don't want anything further on this.

Can you bring your direct examination to a close, please?

Q When you get information, in the course of these -- when in the course of these negotiations you obtain information that would lead you to believe that the exchange of information and the negotations themselves are either breaking down or likely to continue and progress, do you make a point of communicating the status of those negotiations to anybody in the Defense Department?

THE COURT: Sustained.

A I'm not really sure I get the drift of that.

Q I'll rephrase the question --

A Our negotiations, of course, are available to senior levels --

Q All right, the objection was sustained --

A There's no secret about this. I believe the press covers this daily accurately as well.

Q I don't want this.

What I want to know is this: There came a time when you suddenly found you were entering into these negotiations --

THE COURT: Sustained.

I don't want anything more on this issue.

MR. FOLEY: There's one letter handed to me --

THE COURT: While counsel is examining a document, do you inform the Vietnamese when somebody's status is changed from MIA to killed in action?

THE WITNESS: No, we don't.

Q Do you reduce, in any way, your efforts to obtain information when somebody's status is obtained from MIA to killed in action?

A No, we don't. We make no distinction, as I said in my statement for the accounting purposes on the basis of the status, the classifications. That's been true from the start or some seven hundred or 650 cases have had their statuses changed. That's not communicated to the Vietnamese, and in our quite numerous contacts with them, they have shown almost a complete unawareness of this aspect of the subject. I don't think it effects them in any way.

Q I'd like to ask a question in relation to that: Is it your testimony you have not told the Vietnamese of the cases where you have changed the man's status?

A I'm not saying that, and I think you know from the material I've provided to the Court that we made a point of informing them of the fact that the status changes make no difference. We're interested in all these people and we further informed them of this officially on the 16th of August when the status review announcement was made by the Defense Department, and that was conveyed in a formal way at that time, in addition to the Vietnamese and to --

Q Now, what I am asking you is something different. I'm not asking you what you told the Vietnamese, what your position was. I'm just asking you: Is it true or false that in the past, when some status changes were made, you told the Vietnamese that the man had been declared dead?

A No, we don't do that.

Q You have never done it?

A Never.

MR. FOLEY: I'll be ready in a moment, your Honor.

THE WITNESS: I might say the case files that we've passed to them that you are asking about cover cases of men in all the categories, that is PW, missing, killed and no distinction. That element of the case is obviously not relevant to whether they have information about him and whether they can find his remains. Those are our categories. What they have is perhaps informations of remains, that's what we want, regardless of his category.

THE COURT: Is there any cross-examination?

MR. FOLEY: Your Honor, I have a question. I'm trying to find it in this letter which I knew was here.

I'll skip the letter and try to summarize the question. I think it's a letter that he knows about and it can be helpful.

THE COURT: All right.

BY MR. FOLEY:

Q When you informed the North Vietnamese, as you just state, that our position was the determinations of death do not change their obligation to account, what was their response?

A They simply accepted this information and took note of it. They made no response.

Q They neither agreed or disagreed; is that correct?

A They made no response.

THE COURT: All right,you'll have to bring your examination to a close.

THE WITNESS: I think I should say they may have said they understood. I'll have to check my files to see what they said in Paris, but it was something to the effect that they understood or took note of what we were saying.

Q I'm going to ask you: Are you aware of any Department of Defense policy in the past which related to the status of a man, say a POW or a KIA -- POW or MIA as opposed to a determination of death as effecting his chances of survival, if in fact he was alive?

THE COURT: I don't understand the question and I'm sustaining the objection.

I think you'll have to complete your examination.

I'll give you one more question, if you have one.

MR. FOLEY: Your Honor, I have more than one.

THE COURT: What line do you want to inquire about?

MR. FOLEY: The line I want to follow is this:

I have information indicating there was such a policy --

THE COURT: Keep your voice up.

I don't care what the policy was. I'm interested in the present policy.

MR. FOLEY: If represented the reason why status changes were not made at a certain time and the change that takes place relates to Paragraph 23 of our complaints.

THE WITNESS: I think, if I may, your Honor, I think I can clarify that for the counsel and for the Court.

Yes, certainly in the early days of the conflict, when no information was forthcoming from the I ndo China Communist authorities, I think it's fair to say there was a tendancy to list men in the missing or prisoners category, especially often in the prisoner category, even though there was no real evidence to support that, just on the basis of hope and indication. And this was done with the quite specific thought this would sort of put the Vietnamese on the spot with these men and they would have to give us information about them.

I might say one problem we havetoday is some of thosemen were classified missing or prisoner on the basis of far too little information. We have nothing to support or substantiate that for ten, 11 or 12 years.

MR. FOLEY: Object to it.

THE WITNESS: (Continuing) -- that's how they were classified and remained classified. That whole situation has been transformed with the conclusion of the war, the Paris Agreement, the release of the American Prisoners, who, themselves were able to provide a vast amount of information about themselves and often about the others who were lost and ourcontinuing efforts.

MR. FOLEY: I object to that answer, particularly insofar as --

THE COURT: Is there anything further?

MR. FOLEY: I have a question relating to that and then I'll wind up rapidly.

THE COURT: All right.

BY MR. FOLEY:

Q Mr. Sieverts, you have been known in the past to make the observation that you have no proof, actual hard proof that men are alive in Vietnam; do you recall that?

A Well, I said that, that has always been our policy. Of course we are open to the possibility of men being alive, but we certainly have no basis, no evidence for computing that, that is true, that they are alive.

Q Right.

A We have a great deal that suggests the contrary and, of course, have to accept, as a fact, that the Vietnamese have said and the law has said that there are no American prisoners alive from the Indo China conflict.

Q Have you any actual proof of evidence that all Americans are now deceased in Vietnam apart from what Vietnamese have said; have you any intelligent sources or any other evidence that would say, in fact, they are all dead?

A I consider that fact virtually established by all of the information that we have.

Q Do you have evidence that says --

MS. BUCK: He answered the question.

Objection, your Honor.

THE COURT: Sustained --

THE WITNESS: I would say that we have the general flow of information, we have received through a continuing effort a very intensive effort suggests very strongly that that is the case.

Q Do you have more than --

MS. BUCK: Objection.

THE WITNESS: It has been proven negative, which, philosophically and legally is difficult to do.

BY MR. FOLEY:

Q As opposed to an observation, do you have proof--

MS. BUCK: Objection.

THE COURT: Sustained.

Go to your next question.

BY MR.FOLEY:

Q Mr. Sieverts, we had here an exhibit that was marked plaintiff's exhibit one and it was a letter that I sent to a Mrs. Barbara Annis (Phonetic) at the Department of State, who is described as the Director of Freedom of Information staff, and the letter was dated February--April 15, 1975. Do you know Mrs.Annis?

A I do know her and I know of your letter,yes.

Q I'd like to read you a segment from that letter and I want to ask you about it.

This letter is from me to her and to synopsis the beginning portion, it states that I had a phone call with her in which certain things happen and now this is the portion that I would like you to listen to: ". . . Now, you tell me that before any broad review of the POW-MIA situation can even be started, 875 cubic feet of files must be examined. Further, you tell me these files are packed with documents at the approximate rate of 250 pages per inch. . . "

Have you seen that before,that letter of mine?

A Yes.

Q Are you aware of the fact that no response was received to that letter by me?

A I guess I'm not aware of that, no, but I really -- I must say, I think you made a similar response to the Defense Department, so it's possible I saw other versions of that letter, but I'm familiar with your exchange with the staff.

Q I'm asking you now --

A (Continuing)-- and would their response, which is that the broadness of the question you asked for information about was that it was so extremely voluminous, the categories that I recall comprised the entire history and negotiations concerning the Vietnam conflict.

MR. FOLEY: Object to the continuous --

A (Continuing) --

It's voluminous.

MS. BUCK: Objection --

THE COURT: Put your question in --

MR. FOLEY: I can't get one in when he keeps on talking unresponsibly.

THE COURT: Go ahead.

BY MR. FOLEY:

Q What I'm asking you is about the 825 cubic feet of documents. Do you know, whether, in fact, as there was no response to my statement, he told me that he had it--

THE COURT: He answered it.

MR. FOLEY: I didn't hear it.

Can't he give an answer --

THE COURT: He said he didn't know.

BY MR. FOLEY:

Q Do you know anything about this 875 cubic feet of documents?

A I think it reflects an honest attempt to describe what would be involved in trying to respond to your request.

Q Now, do you know -- have you any personal acquaintance with those documents; have you looked at them or read them or know anything about it?

A I think some of them I certainly have, others I probably have not.

Q You don't know for sure to what extent you've gone through them?

A I'm familiar generally with the subject. I worked on the subject for a long time.

Q The last item I want to cover with you is this: We have had discussions with Roger Shields. Will you identify who he is and who he was in recent times?

A I hope the answer still is. Roger Shields is my counter part at the Defense Department. During many of the years, the problem of American prisoners missing has been before us, his title became Deputy Assistant Secretary of Defense International Security of Affairs, with responsibility for economic affairs and for the prisoners of war and missing in action, and he now is a Deputy Assistant Secretary of the Treasury and no longer has responsibility within the Defense Department.

Q Do you know when that change took place?

A Well, sometime not too long after the change in administration, earlier this year.

Q Wasn't it after the Woodcock trip?

A No, as a matter of fact he had already gone to the Treasury before the Woodcock trip. At my recommendation Mr. Woodcock invited him along on that as a staff member or as a supporting member, which is the same status that I had before the Commission, because of his long time acquaintance with the subject and his obvious expertise in this area . He was, at that time already in the area--

MS. BUCK: Objection to this line of questions on the grounds of relevancy.

THE COURT: Wrap it up, please.

MR. FOLEY: I'm going to,Judge.

BY MR. FOLEY:

Q At the time when he went to the Treasury Department, did he remain a consultant with the Defense Department on the POW-MIA issue?

MS. BUCK: Objection.

THE COURT: Sustained.

BY MR. FOLEY:

Q When he was at the Defense Department and was your counterpart at the Defense Department, do you know whether he was the individual responsible for getting policy as to --

MS. BUCK: Objection.

Q (Continuing) -- as to what circumstances to make determination of death --

THE COURT: Sustained.

Q Have you been in touch with Roger Shields over the last couple of days --

THE COURT: Sustained.

A No, I have not.

THE COURT: Don't answer when I sustain an objection.

Q Do you know or are you --

MR. FOLEY: Judge, can I submit this question to you and the opposing counsel before I ask it?

THE COURT: Ask it.

MR. FOLEY: I'm not looking to take advantage --

THE COURT: Ask it and I'll rule o it.

MR. FOLEY: Do you know whether, and if so, to what extent representatives of both sides of this lawsuit have been in communication with Roger Shields over the last couple of days, to get supporting information to what they're looking for --

MS. BUCK: Objection.

THE COURT: Sustained.

BY MR. FOLEY:

Q Mr. Sieverts, last night, in several newspapers around the country and in particular the New York Post, there was an article from Japanese sources, apparently, indicating that there were -- there was some location in Vietnam where live Americans were living and had been seen? Are you aware of this?

A I've heard of the article, not in the New York Post, but I think in the Christian Science Monitor. It sounds like the same article.

Q Do you know anything about it?

A I really know very little about it.

MR. FOLEY: Ok.

THE COURT: Any cross-examination?

MS. BUCK: Just two questions.

CROSS-EXAMINATION

BY MS. BUCK:

Q Ms. Shields -- you refer --

THE COURT: Mr. Sieverts.

MR. FOLEY: You're getting your experts mixed up.

MS. BUCK: Excuse me.

BY MS. BUCK:

Q Mr. Sieverts, you referred to a statement that you submitted to this Court; is that correct?

A I didn't quite hear you, could you speak up?

Q Mr. Sieverts,you referred to a statement you submitted to this Court?

A Yes.

Q And is that statement true?

A Yes.

THE COURT: Don't answer that --

THE WITNESS: It's not sworn to. I didn't have an opportunity to put it in affidavit form,but it is a true statement.

THE COURT: Very good.

MR. FOLEY: Can I ask one question on that?

THE COURT: No.

BY MS. BUCK:

Q Mr. Sieverts, have there been cases of men who we have declared killedin action, whose bodies have been returned to us?

THE COURT: Sustained.

MR. FOLEY: Right.

THE COURT: Thank you very much.

MR. FOLEY: Can I ask one question on this statement of his?

THE COURT: Goodbye.

Good luck on your trip.

THE WITNESS: Thank you, very much and thank you for letting me come back here.

THE COURT: All right, we're meeting again Friday, when you'll have your other witnesses.

At what time did we say?

MR. FOLEY: You said 11 o'clock.

You don't have time for me to talk to Captain Bodan (Phonetic) now?

THE COURT: Are you going to be here Friday?

CAPTAIN BODAN: Yes, [illegible].

THE COURT: Thank you, very much, everybody.

* * * * * * * * * *

(Whereupon, the Court then recessed until Friday, September 23, 1977, at 11:00 A.M.)

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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

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HOPPER, et al., :

Plaintiffs, : 77-C-1793

-against- :

CARTER, :

Defendant. :

---------------------------------x

United States Courthouse
Brooklyn, New York
September 23, 1977
10:00 o'clock A.M.

Before:

HONORABLE JACK B. WEINSTEIN, U.S.D.J.

SHELDON SILVERMAN
OFFICIAL COURT REPORTER

Appearances:

ERMOT G. FOLEY, ESQ.
-and-
JOHN A.K. BRADLEY, ESQ.
Attorneys for Plaintiff

DAVID G. TRAGER, ESQ.
United States Attorney
for the Eastern District of New York

BY: ELAINE BUCK, ESQ.
Assistant U.S. Attorney

SS/ed
1AM-1

(Time noted: 11:00 a.m.)

MS. BUCK: Before I proceed, we would like to get something on the record. There was testimony on Wednesday with respect to the accounts of these men, what happens in the event they return the money that was previously in that account. The testimony that was given at that time was true; however, since that time I've gone to the Department of Defense and discussed with them what I consider to be amiguity in policy.

They have indicated that in a situation where a man returns and he is estranged from his wife, or whomever it was to whom the money was given, in those instances, the Secretary will pay out again. However, if he's still married and money had been paid to his wife, that would have to be a situation where they would have to work it out.

THE COURT: I would expect so, of course.

MR. FOLEY: I have one point to make. This morning at 3:15 a brief was being assembled in my office for delivery to you at 10:00 o'clock. I discovered page 24 is missing. There's a boy on the way from my office now. I regret that.

THE COURT: I'll be happy to get it later.

MR. FOLEY: I have one other point I must regrettably make.

THE COURT: If anybody wishes to smoke, by all means they can go ahead and do so.

MR. FOLEY: Your Honor, in close to 20 years of litigation cases, I've never had occasion to raise the objection that I must raise now. I do so with the greatest reluctance.

We've been reviewing the transcript provided by the reporter in this case. I've never seen anything so completely bad in my life in terms of being unintelligible. I remember distinctly in the early phases of this proceeding there was an occasion when reference was made, for instance, to Enoch Arden Laws. We stopped the record and spelled it to the reporter and the transcript as provided is still totally unintelligible.

THE COURT: Work it out with your opponent. I'm sure you'll have no problem.

MR. FOLEY: I would like to make that record intelligible. It's awful now.

THE COURT: If there's any problem, I'll correct it. Who are we hearing as a witness?

MR. FOLEY: The witness this morning is Mrs. Karen Martin, who is testifying by telephone from

Florida.

THE COURT: This gentleman here with me is Judge Bentel from the District Court of Tel Aviv who is hear to observe American practices.

Her first name?

MR. FOLEY: Karen, Mrs. Karen Martin.

THE COURT: Mrs. Martin?

THE WITNESS: Yes?

THE COURT: My name is Jack Weinstein. I'm presiding at this trial. It's being held now in my chambers and the reporter is taking everything that's said. We're doing this for your convenience since I understand it is difficult for you to come to New York.

THE WITNESS: Thank you.

THE COURT: If you will listen clearly, if there's ever any question about hearing anything, let us know. Try to speak up. Your voice is a little low.

THE WITNESS: All right.

THE COURT: Speak up and speak closer to the microphone.

You'll hear first from Mr. Foley who will examine you on direct. First you'll be sworn. Swear the witness.'

(Continued on next page.)

KAREN L. MARTIN, called as a witness, having been first duly sworn by the Clerk of the Court, testified as follows by telephone:

THE CLERK: Full name?

THE WITNESS: My name is Karen L. Martin.

THE COURT: Where are you testifying from, Mrs. Martin?

THE WITNESS: I'm testifying from Palm Beach, Florida.

THE COURT: Proceed.

DIRECT EXAMINATION

BY MR. FOLEY:

Q Mrs. Martin, are you an attorney?

A Yes, I am.

Q Where are you admitted, please?

A I'm admitted to practice in the State of Florida and also to practice in the District of Columbia.

Q Do you practice law actively in Palm Beach now?

A Yes, I've been practicing in Palm Beach for 4 years, no, almost four and a half.

Q What is your firm?

A I'm a partner in the firm of Paty, Downey, Lewis, Eaton, Fick, and Martin.

Q This last name, Martin, is you; is that correct?

A Yes.

Q Apart from being a member of the bar, have you had any past relationship with the military?

A Yes, I have. My father is a retired career officer, Airforce officer. My father-in-law is a retired career Airforce officer. Of course, my husband was in the Airforce.

Q Did you grow up, in other words, in a military environment yourself?

A Yes, I spent my whole life as part of a military environment.

Q I understand that the reason why you didn't come here this morning was because of an injury; is that correct?

A Yes, I have a fractured hemerus, which is the bone that connects to the shoulder.

Q Which arm?

A In the left arm.

Q I would just like to state for the record that if in the course of this testimony you feel any discomfort or anything else, please notify us and we'll adjust things so it would not be stressful for you.

A All right, thank you.

Q Would you kindly identify, or give us the name your husband?

A Yes, Captain Douglas K. Martin.

Q Did you state a moment ago he is currently in missing status?

A Yes, he is, he's been listed in the missing status since April of 1973, when his plane crashed in Cambodia.

Q During the period since 1973, have you been actively involved in Missing in Action family activities?

A Yes, I've been extremely active. I've given speeches. I've kept up with all the information on the Missing in Action. I've done quite a bit of traveling and sponsoring all kind of MIA activities locally.

Q During that period of time, have you made it a point to remain acquainted with other MIA families and to discuss mutual problems with them?

A Yes, definitely.

Q In April of 1974, did you receive a notice from the Airforce?

A Yes, I did.

Q Can you give us the date of that notice and tell us when you received it?

A Yes, the letter was mailed to me on April 8 -- it's dated April 8th of 1974. I didn't receive it until Good Friday of 1974, the precise date I don't know. It was a notice that there would be a status review hearing for my husband and the status review was to take place on April 16th, which I recall was a Tuesday. That meant I received notice on Good Friday that the following Tuesday there would be a status review hearing on my husband.

Q Thereafter, in conjunction with anything you did, as a result of receiving that notice, did you work in cooperation with any other members of the bar?

A Yes, I certainly did. I conferred with partners in my own law firm, and as soon as I realized there was going to be a hearing and extensive preparation needed to be done for it, I hired a law firm in San Antonio, where the hearing was to take place, to review the records and represent me. The name of that law firm was Tinsman and Houser.

Q They're attorneys in San Antonio, Texas; is that correct?

A Yes.

Q Was that firm recommended to you by somebody?

A Yes, it was. It was recommended to me by a local lawyer, a Palm Beach lawyer, who at the time was the president of the American Trial Lawyers Association for the entire United States.

Q Were there any other lawyers involved with you in the preparation for this hearing that you've just alluded to?

A Yes, there was one lawyer who was very much involved in preparation for the hearing. His name was Gavin Letts. At the time he was in private practice here in Palm Beach. He's currently a Judge on the Fourth District Court of Appeals --

Q In Florida?

A This area, yes.

Q Did the Tinsman firm and the attorney, Gavin Letts aid you in the preparation for the status review hearing that was scheduled?

A Yes, they did extensive preparation in addition to the preparation which I did myself.

Q Can you describe some of the problems that required the attention of attorneys to prepare for that status hearing?

A Yes, I certainly can. The notice which I received from the Airforce informed me that no classified information will be made available to me for purposes of the hearing, nor could it be considered by the members of the reviewing board, and it had come to my attention from sources outside the Airforce that there was classified material pertaining to my husband and that it was important that it be produced at the hearing.

It had to do with the sighting of 3 U.S. military prisoners of war in Cambodia, a few months after my husband and three other men became missing in action. I learned of that information through the father of the navigator in my husband's plane. He had traveled to Southeast Asia and with extensive difficulty was shown information in a classified file.

Q What was the name of that man who found that information?

A The man who found the information is Sam James, J-A-M-E-S; Samuel James. He was the father of the navigator in my husband's plane.

Q Can you describe Mr. James in terms of who he is or what are his qualifications, what was his career or job?

A He spent sometime in the military, but then he went with the Police Force in Chattanooga, Tennessee.

Q I see.

A He traveled to Southeast Asia in approximately October of 1973, seeking information about his son. He traveled to the Joint Casualty Resolution Center in Thailand.

Q Sam James, then, told you that there was a report that indicated some sightings; is that correct, is that what you're testimony was?

A Yes.

Q Can you tell us anything further that he told you about that report?

A Yes, he told me that he had begun to examine the file of his son there at the Joint Casualty Resolution Center, but there was very little information in the file; that he requested the Major in charge of the records about additional information; was told there wasn't any. At that point, Mr. James turned to the back of his son's file and found a hand receipt for classified information which was stored in another drawer, and he asked the Major about that classified information, and Mr. James explained to the Major that he had come all the way from the United States, half way around the world seeking information about his son and that he had to see that information.

The Major denied him permission to see it and explained that the only person who could give permission to that was the Commanding General of the JCRC. At that point, Mr. James pleaded with the Commanding General to be permitted to see that information, and he was permitted to see it on condition that he not discuss it with any members of the press and not reveal it to anyone but his own immediate family and not take any notes.

When Mr. James returned, since my husband was involved in the case, he did notify us about it. That was in approximately October or November of 1973. Since the information was classified and we were from a military background, we discussed it with absolutely no one. We decided there must have been a purpose for it being classified, and we refrained from discussing it by phone or discussing it with anybody else. We were sure the information would be treated properly by the service and brought to light when it was needed.

Q In other words, are you saying that without knowing why you respected the classification?

A Yes, absolutely.

Q Do you know whether or not in that report there was -- you testified there was a sighting indicating three Americans. Do you know whether in fact those 3 Americans were correlated with any particular individuals?

A The report was entitled, "Sighting of Three U.S. Military POWs." The Join Casualty Resolution Center has attached a sealed comment, what they called a sealed comment to the sighting report, saying that there was no definite correlation; however, there were only 4 U.S. Airforce men known to be missing in that area in that time frame, and then the report listed the names of those men who were missing at that time.

Q Was one of them your husband?

A Yes, one of them was my husband and one of them was his navigator, Sam James, Jr.

Q You've testified that the hearing was scheduled for the Tuesday following the Friday on which you received the notice?

A Yes.

Q And that you found that a bit short?

A Extremely.

(Continued on next page.)

DIRECT EXAMINATION

BY MR. FOLEY: (Continued)

Q What happened about that?

A Since that was Easter weekend and it gave me no time to prepare for the case at all, I immediately contacted the attorney who was President of the American Trial Lawyers Association, got a referral from the law firm in San Antonio, called them immediately and explained to them what my problem was and that I was to attend a hearing the following Tuesday without time to prepare , and asked them to represent me. They agreed and immediately contacted Randolph, the casualty office.

Q Was the hearing actually conducted on the original scheduled date?

A No, it was not. After demand by the law firm of Tinsman and Houser, their objection to the failure to allow reasonable time for preparation, the hearing was postponed and it was postponed until approximately June 24th of 1974. It gave us additional time to prepare.

Q The Judge has just indicated you should hold up for just one minute. We're going to do something else here. Apparently somebody is going to sit down in the room. Relax and we'll be right back with you.

A All right.

Q Mrs. Martin, we got down to the point -- I think your last testimony was that as a result of the applications that you and your cooperating counsel made, the hearing was adjourned until June of 1974; is that correct?

A Yes, that's correct.

Q During the period from April to June of 1974, did all of the lawyers that you named before become involved in the preparation?

A Yes, ostensibly.

Q Did all of them charge?

A No, all of them did not. The law firm of Tinsman and Houser did charge me for all their services, both legal fees and costs. The attorney who represented me fro Florida donated his time. His expenses were all I paid for. He had known my husband prior to the time we were married and I had previously been employed by the law firm that he worked with, and he donated his time.

Q In other words, did he donate his time because of his personal friendship to you and your husband?

A Yes.

Q Can you tell us, did the firm in San Antonio render a bill?

A Yes, they did.

Q Can you state the amount that you had to pay the firm in San Antonio, Texas?

A Yes, the firm in San Antonio, Texas, sent me a bill for approximately $2,550.

Q Did that include fees and disbursements?

A It did not include all disbursements. I was charged an additional $252 for a transcript of the hearing in San Antonio. We at our own expense hired a court reporter since one could not be supplied for us by the Airforce.

Q Did you tell me that you spent some time, which, of course, you didn't bill yourself for?

A Yes, I spent considerable time.

Q I would like you to give me a description of the more important aspects of the work that you personally did. Now, I'm not talking about non-legal work. I'm talking about the work that you did which required the services of an attorney in the preparation for this hearing and, if you can sort of like take it item by item, and we'll cover them one after another.

A I did some basic research on administrative procedures and remedies, and reviewed the rules and regulations for status review hearings. I had to travel to Holmstead Airforce Base to talk with pilots who had known my husband and knew the circumstances of laws and to obtain affidavits from them as to what had happened.

Q Let's stop right there. Can you tell us how much time and how much money you spent at the research and travel to Holmstead?

A Holmstead, approximately two days.

Q Did you have any out-of-pocket expenses because of that trip?

A Yes, approximately $50 worth of expenses. That's not including, of course, the bill for legal time which is my own. That was not included.

Q In other words, is it fair to say that if you did what you did for somebody else rather than yourself, you would have charged for two days time and you would have charged that person as a client for $50 in disbursements?

A Yes, and the $50 is a conservative figure, but that's how I would put it.

Q May I ask that you be conservative? We want to be sure we're right.

A Yes, the going rate in this area is $65 to $75 an hour. A conservative figure would be $50 an hour for legal fees.

Q I'll take the conservative figure.

After your trip to Holmstead Airforce Base and you acquired some information -- by the way, did you go to Holmstead alone?

A No, Mr. Letts went with me, the attorney who represented me at the status review hearing.

Q After your trip to Holmstead, what was the next particular block of work that you can recall?

A I also traveled to Washington, D.C. to speak with my husband's squadron commander.

Q Was that once again to ascertain or to obtain facts and information?

A Yes, yes, it was.

Q Was the purpose of obtaining those facts and information to use it in the status review hearing?

A Yes.

Q Do you have any figures, or can you recall any figures on the amount of time that was required for you to go to that visit and the amount of money that you spent on it?

A Yes, that was approximately two days worth of travel.

Q You mean travel and work?

A Travel and work, yes.

Q In other words, your services are included in the two days?

A That's right.

Q Did you have any out-of-pocket disbursements?

A My air fare, yes.

Q What would that be, were you living in Palm Beach then?

A Approximately $250, certainly.

Q Now, after -- once again, was that trip to Washington to obtain material for a hearing which -- strike the question.

MS. BUCK: The Government objects to this line of questioning on the grounds of relevancy.

THE COURT: It is relevant. Just give us the total figure that she spent.

MR. FOLEY: I'll do exactly that.

Q Mrs. Martin, have you made a calculation of the major items that you can now recall of work that you did, lawyer work that you did, and major disbursements that you made?

A Yes, I did. I have a figure for just my expenses alone. This is out-of-pocket expenses for me.

Q Yes, how much were they?

A Okay, my out-of-pocket expenses for the work that I did were approximately $2,000 to $3,000.

Q Did you actually prepare a schedule of those expenses for purpose of some dealings you had with the Internal Revenue Service?

A Yes, I did. The list was approved by the

Internal Revenue Service.

Q Over above that, let's take a look at time. Have you calculated the number of hours that you spent personally in the preparation for this hearing in the course of doing legal work? I'm not talking about non-legal work -- legal work.

A Yes, I have the preparation that I was required to do in order to be ready for that hearing, took approximately 103 hours.

Q Yes, we've evidence that we're going to cut your charges down to $50 an hour despite the fact that you're a partner in a firm. We can do the arithmetic here. I think we have the numbers on that.

Now, in addition to this, you worked closely, as I understand it, with Gavin Letts throughout this period of time?

A Yes, I did.

Q Are you acquainted with the things that Gavin Letts did with the legal services that he performed?

A Yes, I am because we worked hand in hand.

Q Have you checked out how much of Mr. Letts's time was spent in legal services on this case?

A He spent approximately 66 hours.

Q How long has Mr. Letts been a lawyer, do you know, approximately?

A Mr. Letts has been a lawyer for about 20 years.

Q He's now an Appelate Court Judge in Florida; is that correct?

A He's a Judge on the District Court of Appeals.

Q Would it be fair to say that in Florida an attorney of his caliber would receive -- would bill for his time for a figure of $75 an hour or more?

A Yes, that would be fair.

Q As I understand your previous testimony, you took care of disbursements; is that correct?

A That's right, I picked up all the expenses.

Q And Mr. Letts did not have any disbursements of his own apart from the ones -- in other words, his disbursements are included in this $3,000 figure you mentioned a moment ago?

A Yes.

Q I want to ask you this question. Was all of this legal work necessary?

A Absolutely.

Q Can you state for the record why?

A Because it fell -- it became -- the burden fell on our shoulders to get and produce the information that we needed for that hearing. We had been denied access to classi fied information which we had to have produced. It took on the aspect of an adversary proceeding, really. We were expected to produce our own evidence, produce our own witnesses and we were put in a position which we had to prove that my husband could have survived the crash.

Q You had to prove, in other words, all about this sighting report and that business?

A Yes, we had to dig up all the information. We had to produce evidence showing that he could have survived.

Q May I ask you this. Listen, let's strike that. I don't have to ask anybody if I can ask them a question and pay $150 a page for it. I'm sorry, but I just sounded foolish myself.

Could I have the last question read back?

(Read back.)

MR. FOLEY: Never mind, I know what it is.

Q In the process of performing all of these chores that you've described as necessary legal services, it was for the purpose of obtaining defensive materials which you did not readily acquire as I understand your testimony, from the Airforce?

A Yes, that's correct.

Q I would like to, in light of the fact that you're an attorney, and in addition you are an MIAwife, and in addition you have listed your entire life close to the military life and the way that it operates, I would like to ask you --

MS. BUCK: Objection, there's no foundation for any of that.

MR. FOLEY: There certainly is. She testified to every bit of it.

THE COURT: Overruled, I'll permit it.

Q I would like to ask you whether you have considered and are able to give us your appraisal of the performance of the Airforce Casualty office in your case?

A Well, I was disappointed in the handling of classified information. I don't know that I can limit that to the casualty office. I think that perhaps as Airforce wives, it involves a defense intelligence agency and the Joint Casualty Resolution Center. It's my very strong feeling that all information which could possibly be pertinent to whether or not a man -- the status of the man should be produced for that hearing, for the family and for the hearing board. In my case, it would not have been except for individual efforts in discovering there was some information which could possibly pertain to my husband and our very strong efforts to get it produced by hiring lawyers and demanding that it be made available to the reviewing board.

So, I'm disappointed in the handling of classified information on matters which could be pertinent to a man's status, yes.

(Continued on next page.)

Q Mrs. Martin, how many years is it since your husband's casualty?

A It's been since April, 1973, so there is a little over four years.

Q Mrs. Martin, is it true recently you personally have requested a status change?

A Yes, that is true.

Q Can you tell us on what basis or how you reached the decision it was appropriate now for you in your case to make that request?

A I have made extensive investigation for four years. I traveled to see the General who was in command on the Joint Casualty Resolution Center at the time the report came in on my husband.

I traveled throughout the United States talking to pilots who had flown with my husband and were familiar with the area of the crash site.

I traveled in April to Southeast Asia and spent time there talking with the men who are experts on the Combodian situation and the situation in Vietnam.

Through my own family and connections that were made privately as to my husband's status, and as a result of those extensive investigations I concluded that a status change would be appropriate.

Q Is it not true -- is it true that among the things you have now seen there is an actual photograph of the crash site?

A That is correct.

Q Can you tell us whether or not any substantial amount of the information that has led you finally to this conclusion was available to you or could have been made available to you by the Air Force?

A Yes, definitely it could have been made available to me by the Air Force. Sighting reports, in my opinion, could have and should have been forwarded from the Overseas Office to the Randolph Air Force Base and sanitized versions should have been given to us immediately with whatever their conclusions were as to whether or not the information was valid.

The information was not passed on to us. We had to decide on our own. There was a lot of secrecy about it that made us extremely reluctant to have any confidence in what we were told by the Air Force and felt we had to pursue the matter on our own.

Smaller things took place, a friend of my husband who had flown with him and had taken pictures of the crash site had attempted to reach me through Randolph Air Force Base and I finally had to discover he was trying to reach me on my own.

He called Randolph Air Force Base and asked them to contact me, the letter says, and they said the letter was sent to me notifying me he was attempting to contact me. That letter was never sent to me. They later acknowledged they made an error.

A series of incidents such as that made us feel we weren't always getting all the information people had to provide us with.

I don't know whether that is clear.

MR. FOLEY: I think it is clear.

Your Honor, if I may take a moment to check over my rather disorganized notes to see whether I want to go into anything beyond this --

THE COURT: Yes.

(Pause.)

MR. FOLEY: Your Honor, I believe that is all. Excuse me for a moment.

(Pause.)

MR. FOLEY: Yes, yes.

DIRECT EXAMINATION

BY MR. FOLEY: (Cont'd.)

Q Mrs. Martin, you testified to the fact that there was another man in the plane with your husband, that was a gentleman by the name of James, is that correct?

Martin-direct

A Yes.

Q At the time that you had the status review hearing in 1974, was it a joint status review hearing both with respect to your husband and James?

A Yes, it was.

MS. BUCK: Objection to any discussion of the James case.

THE COURT: Overruled.

Q What was the result of your status review hearing?

A As a result of that hearing both men were continued in the missing in action status.

Q Have you remained in contact with the James family?

A Yes, I have.

Q Do you know what happened to the James case after the status review hearing that you just testified to?

A Yes, I do. Some months later the wife of the navigator, Sam James' wife, came back and recontacted the Casualty Office and asked for a separate status review hearing for her husband.

And as a result of that hearing his status was changed.

Q Was it changed with a waiver of a hearing?

A Yes.

MR. FOLEY: Thank you, that is the end of my direct examination, your Honor.

CROSS-EXAMINATION

BY MS. BUCK:

Q Mrs. Martin, my name is Elaine Buck and I am an Assistant United States Attorney --

A I'm having trouble hearing you.

Q My name is Elaine Buck and I am an Assistant United States Attorney. I am representing the defendants in this case.

I just want to ask you a few questions. First of all, if my understanding is correct, you testified that you were given notice of the status review in April, is that correct?

A Yes.

Q You subsequently testified that that hearing was adjourned, is that correct?

A Yes.

Q You testified it was adjourned at the request of your attorney, is that correct?

A Yes.

Q Did you yourself make any attempt to obtain an adjournment?

A Did I make any attempt to obtain an adjournment?

Martin-cross/Buck

Q Yes.

A I contacted the lawyer immediately since it appeared from the notice which I had gotten I would only have about four days to prepare and I had been told I wouldn't be able to obtain classified information.

Q Did you make an attempt to contact the Air Force yourself?

A No.

Q Do you have any reason to believe if you had requested an adjournment it would have been denied?

A I don't know whether it would have been or not but I was absolutely certain I would have been denied access to the classified information and for that reason I needed an attorney.

Q Now, you referred to certain classified information involving a sighting of your husband, is that correct?

A Yes.

Q Can you tell us to your knowledge what happened in your husband's case with respect to his plane, was it blown up or what exactly happened?

MR. FOLEY: If she knows.

Q As far as you know?

A I don't know that anyone knows exactly what happened. These are the circumstances of my husband and a second wingman, a second airplane -- two F4's left Thailand on the afternoon or late morning of April 18, 1973. They flew to the northeastern section of Cambodia where their goal was to mark a target which was a small bridge.

My husband was the lead plane and his duty was to mark the target with smoke rockets and the wingman was to come in and drop bombs on the small bridge marked with the smoke rockets.

The weather was hazy from talking to the wingman in the plane. Visibility was not particularly good. The wingman and my husband approached the target area above a cloud layer. The wingman did not have my husband in sight for an extensive period of time before and after he descended through the clouds.

The wingman did not have sight of him and so notified him but said: Don't worry, I think I can pick up your smoke rockets after you drop.

My husband notified the wingman he was going to send through the cloud layer and mark the target.

The last transmission from my husband was he was in to mark the target. After that the wingman didn't see any smoke rockets and didn't have any further communication with him and became concerned and first thought that my husband's radio had gone out since on the way to the target area he had radio trouble -- or at some time during the mission.

So the wingman made extensive radio calls back to the home base and other bases thinking my husband may have gone back.

Some time passed before he decided he should go look at the target area. He went down and I believe the records say he saw something which looked as though something had been bombed in the area. Smoke and dust rising from the target area, but he didn't see anything that looked like a plane or piece of wreckage.

That is how the situation was on the day his plane crashed.

As I understand it, subsequently a photo reconnaissance was done of the area and some pieces of wreckage, I think a landing gear, was spotted from the photographer.

I don't think anyone concluded definitely what happened to him, whether he was shot down or whether he pulled out too low on the target. There are various opinions of what happened.

Q From your knowledge, do you know where your husband went down?

A I do know now. I did not know at the time because I was not given precise coordinance. But there are precise coordinance and the crash site can be pinpointed.

Martin-cross/Buck

At the time I didn't know about the Village of Bung Lung --

Q Can you stop and spell that Village?

A B-u-n-g L-u-n-g is a phonetic spelling. I don't think that is the proper spelling but that is close.

Q In your testimony you referred to a sight report; do you recall from the information you have where the men mentioned in that sighting report were seen?

A In an area called Prey Veng.

Q Mrs. Martin, do you know or can you tell us if you have any idea how far that sighting was from where your husband's plane went down?

A Well, I have been told it's some distance, possibly 200 miles.

Q That sighting, was that north of where your husband went down or south?

A I believe it was south of where he went down.

Q Do you know if there is any report of any prisoners having been taken in that direction?

A I would have no idea. I know there are extensive sighting reports which are not available to me because they are considered classified.

Q The report that you saw, do you recall how it referred to these men?

A We've got a little bit of a problem in that Sam James, Jr., the father of the navigator, who came back from Southeast Asia claims that the men were seen in Northeast Cambodia and were heavily bearded and under guard. That's how the report read.

The report I saw, which was a sanitized version, came through to Randolph Air Force Base entitled: Sighting of three U.S. Military P.O.W.'s, and went on to describe where they were seen and I believe it was -- I believe the comment of the CIA report, their comment on the agent, was he was a reliable agent and he got in good reports before but they didn't have any reason to believe they were bringing this report in for a monetary reason but the problem is the report was it was second-hand information.

MR. FOLEY: Would you give the report of the spelling of that Province you mentioned?

THE WITNESS: P-r-e-y V-e-n-g, again I am guessing on it.

Q Has that report ever been subsequently re-evaluated to your knowledge?

A Yes, it has been. My understanding is that some two years after the agent first brought in the report it was re-evaluated and allegedly he changed his story slightly.

I would guess his memory was best closest to the incident and that's when he first got in the report in July 1973.

Q Have you seen your husband's file in the last two years?

A I am sorry?

Q Have you seen your husband's file in the last two years?

A Two years? Yes.

Q Can you tell us when you last saw your husband's file?

A I was at Randolph Air Force Base, I believe it was May of this year. Probably the first few days of May.

Q Did you take a look at the file?

A Yes.

Q Do you have any information -- do you have any information or possess any information that was not in that file at that time?

A Do I have any now?

Q Right.

A No, I don't.

Q Do you have any information which would lead you to believe your husband is still alive?

A No, I don't. Here's one point, I wouldn't

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know whether information was missing from that file if it were classified. That was the problem in the first instance. I would have never known that reports existed had it not been for the father of the navigator.

If you are told there is no information you have nothing to disprove that with unless you make a request for classified records with great effort.

Q Were you employed at the time your husband went down?

A No, I was not.

Q At what point did you become employed?

THE COURT: Don't answer that. What is the significance of this?

MS. BUCK: Your Honor, I think the point has been made that she did it at great cost to herself.

THE COURT: Denied. This inquiry is not relevant.

MS. BUCK: I have no further questions.

MR. FOLEY: There is no question pending that needs an answer. I am going to engage in a very short redirect.

REDIRECT EXAMINATION

BY MR. FOLEY:

Q You testified between the time of Good Friday

Martin-redirect

when you received the notice and the following Tuesday, when you were scheduled to report for a hearing, you did not contact the Air Force directly. I want to know whether or not that was due to the fact that time was so short and something had to be done more directly?

A Yes, absolutely, because it was Easter weekend and the hearing was going on on a Tuesday. Somehow I had to get the classified reports.

Q The next question, would you again for the record -- as a preface to the next question -- state again the date of your husband's casualty.

A April 18, 1973.

Q Was it on a combat mission?

A Yes.

Q Was that combat mission undertaken after the date on which the Paris Peace Agreement was signed?

A Yes, it was.

Q That was in Cambodia?

A Yes, it was.

Q From your experience in dealing with families of M.I.A.'s and your knowledge of the M.I.A. situation, do you regard it unusual to find reports of an individual sighting 200 miles from the place where it's believed to be the site of the casualty?

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Martin-redirect

A I am sorry, I don't understand the question.

MR. FOLEY: Strike the question.

THE COURT: I will take judicial notice of that.

MR. FOLEY: That is all, your Honor.

THE COURT: Thank you very much, Mrs. Martin. I hope you feel better.

THE WITNESS: Thank you. Are we finished?

THE COURT: Goodbye.

(Telephone conversation concluded.)

THE COURT: Does that complete the evidence?

MR. FOLEY: I have a very, very short matter to cover with Captain Vohden. Then we have a few points to go over.

THE COURT: All right. Bring in the people in the other case.

(A recess was taken from this case at this time while the Court attended to another matter.)

THE COURT: All right, back to the M.I.A. case.

MR. FOLEY: Your Honor, as I reported before the last examination, I regret to say there was a page missing from my brief. My office has furnished that page and I have given a copy to the Assistant United States Attorney. I wish to submit it for your

15 insertion in the brief.

THE COURT: Captain, would you mind sitting here.

RAYMOND A. VOHDEN, having been previously duly sworn, resumed the stand and further testified as follows:

THE COURT: Do you have any questions for the Captain?

MR. FOLEY: Yes, your Honor.

DIRECT EXAMINATION

BY MR. FOLEY:

Q Captain Vohden, during your testimony the other day, you made reference to a Sergeant Ridgeway?

A Yes, sir.

Q You made reference to the fact that Sergeant Ridgeway and others had been the recipients of certain types of benefits or something like that?

A Yes.

Q On last Monday morning the trial started, did you know about that situation?

A Yes.

Q I am talking about Monday morning, in effect did you make inquiries since the trial started to get the facts of the Ridgeway situation?

A During the select committee -- during the trial.

A Can I explain?

THE COURT: You may.

THE WITNESS: During the course of the Select Committee the question was asked of the Department of Defense. We investigated that question at that time and that information was obtained at that time. It's in the Select Committee report.

To assure that we were absolutely right, I went to the Marine Corps and I had them review the records to insure what I was testifying to would be true.

Q When did you do that?

A I guess since the trial started.

Q Where did you say you went?

A To the Marine Corps.

Q Did you make any telephone calls to anybody else?

A Yes, I went to Dr. Shields.

Q Didn't you in fact call Dr. Shields?

A Yes.

Q Roger Shields, whose name came up here?

A Yes.

Q How about anybody else?

A Only Ridgeway. Offhand I can't think. Can I explain? I did not go to Roger Shields to find out about Ridgeway per se. I went to find out about a policy to insure that the policy existed.

Q Did Roger Shields tell you that it was or was not a policy?

A He told me as far as he knows it was not a policy at that time but the Department of Defense did correct the man's record and corrected another eight men's records the same way.

Q Did Roger Shields explain --

MS. BUCK: Objection. What relevancy is there to this?

THE COURT: I don't understand why we are getting Shields' hearsay in in this way.

MR. FOLEY: I tried to get Shields here and attempted in the best way -- as poor as it was -- that I could get Shields suppoenaed.

THE COURT: Why?

MR. FOLEY: I believe his testimony and the people Shields could lead me to will be inconsistent with some of this on the question of whether it is a policy. If you want to stop me --

THE COURT: I will. Shields is no longer an official --

MR. FOLEY: He is.

THE COURT: -- charged with any of these matters.

MR. FOLEY: This is the situation, first of all, everyone of the so-called officials I am trying to bring out are going to Shields to find out what the facts are.

In addition to that, Shields was a consultant up to the eve of trial and he is still a Government employee.

THE COURT: I don't see what he is going to say that is going to be helpful. If you want, we could have him examined over the phone.

MR. FOLEY: He refused to be available over the phone --

THE COURT: If I had ordered him to testify he would have. I am not going to permit this hearsay on this application.

MR. FOLEY: If that is the ruling, I must live with it.

THE COURT: Yes. You can take his deposition.

MR. FOLEY: That would be a good solution to it.

THE COURT: Is there any other evidence you have?

MR. FOLEY: One more thing. That's all, Captain Vonden.

THE COURT: Thank you, Captain.

MR. FOLEY: Your Honor, I am going to skip the rest.

THE COURT: I have a 2:00 o'clock hearing. I take it you are making a motion on the basis of the plaintiff's evidence to set aside the temporary restraining order?

MS. BUCK: I am not sure at what point we are. I was under the assumption we had consolidated both the preliminary and permanent injunction.

MR. FOLEY: I was not.

THE COURT: Excuse me.

MS. BUCK: We are moving to dismiss.

THE COURT: And set aside the TRO?

MS. BUCK: Yes.

THE COURT: I will hear you at 2:30. I want your arguments to be brief and to the point. I am going to rule on the TRO. Whether I will rule on the motion to dismiss, I am not sure.

I have a hearing at 2:00 o'clock that requires

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me to take evidence in the case of a major housing project. I must rule on it immediately. I hope to be through by 3:30.

I will hear arguments from both sides first on the TRO and I will give my opinion on the TRO from the bench.

Whether I will go further than that depends on the nature of the argument.

MS. BUCK: Two points, during the trial you asked two questions, one with respect to Mr. Brooks and an SIA file I have answered. You also asked for the DIA file in the Bosiljevac case. We have an individual here with the DIA file and can make him available.

THE COURT: Who has the DIA file?

MS. BUCK: He's not here.

THE COURT: Have the file made available to me at 1:45 in chambers with him present while I examine it.

I will examine it in chambers since it is secret.

MR. FOLEY: At that point, since the two families are involved, would you consider a request they should be permitted to see the files?

THE COURT: I will look first.

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MR. FOLEY: There was at the very beginning of this trial an objection made by the Assistant United States Attorney objecting to the subpoenas which I served. For the record I would like to have a ruling. I served a subpoena, not perfectly, but the best I could --

THE COURT: I can't make a ruling on that. I have nothing before me.

MR. FOLEY: I call for the presence of -- I served a subpoena calling for the presence of Roger Shields as a person --

THE COURT: As far as I am concerned, the hearing is now closed. If you want to submit anything submit it and I will hear you on this issue with respect to whether I should dismiss or allow the case to go forward on the merits. This afternoon we will first have argument on the TRO and I will rule on that.

MR. FOLEY: Do I take it by leaving it that nobody is under the assumption I am waiving the fact I want Shields here? If that is understood --

THE COURT: Fine.

3:30 in open Court. Thank you very much everybody.

(Recess taken at this time until 3:30 this afternoon.)

(Continued on next page.)

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AFTERNOON SESSION

THE COURT: I'll hear you argue, ladies and gentlemen.

MR. FOLEY: Your Honor, before we left this morning or actually early afternoon, the last point to be covered was really two points. One is, I requested permission to place in the file of the Court the civil subpoenas which I served and have them as a matter of record.

THE COURT: Mark them for identification.

THE CLERK: Plaintiffs' Exhibit 32 for identification.

MR. FOLEY: Subpoena for James E. Carter by Frank Sieverts.

The next one is a civil subpoena addressed to James E. Carter, Jr. by Dr. Roger Shields. I might say each of these five subpoenas has annexed to it a schedule of documents which were also sought and affidavit of service.

THE CLERK: Plaintiffs' Exhibit 33 for identification.

xxx (So marked)

MR. FOLEY: The next is to the defendant W. Claytor, Jr.

THE CLERK: Plaintiffs' Exhibit 34 for

2 identification.

xxx (So marked)

MR. FOLEY: The next is to the defendant John C. Stetson.

THE CLERK: Plaintiffs' Exhibit 35 for identification.

xxx (So marked)

MR. FOLEY: The last is to the defendant Clifford L. Alexander.

THE CLERK: Plaintiffs' Exhibit 36 for identification.

xxx (So marked)

MR. FOLEY: And as noted for each of these has attached schedule of documents and affidavit of service.

THE COURT: During this recess the Court has examined the secret and other classified material that plaintiff requested the Court to examine. There is nothing in that material which in any respect that the Court can determine, adds to the information already in the file open to the parties in the action.

The only material is with respect to sources that I saw that I believe the Government properly classified.

MR. FOLEY: You do?

THE COURT: I do. It was the information that was available to me. All of the substantive information was made available. There is no substantial information left out.

MR. FOLEY: I was about to make two requests with respect to it. The first one, I believe you've anticipated and that is on behalf of the men and I think I still should make it as a matter of record. On behalf of the families of the men who are the subjects of those reports and who are here, they have asked me to ask you to direc that those documents be made available to them.

THE COURT: I don't think they should be. I shouldn't be mistaken about matters which I should take judicial notice.

MR. FOLEY: I see.

The second thing, may I inquire --

THE COURT: They relate only to sources and not to substance.

MR. FOLEY: Might I inquire whether or not there is any evidence or testimony to show that these files indeed do contain all of the information in other intelligence sources of the United States Government?

THE COURT: I just examined what I had available, whatever was in that file, but there is nothing in that file that suggests they're holding back anything.

MR. FOLEY: Do you want me to proceed, your Honor?

THE COURT: Please.

MR. FOLEY: Your Honor, I would like to address the two motions that are before the Court very, very briefly. I would like to do them in the order that I think -- the sensible thing would be to address the dismissal first and preliminary injunction second.

THE COURT: No, I prefer the temporary restraining order over the preliminary injunction first.

MR. FOLEY: Very well, sir.

Essentially as pointed out in the documents we filed, particularly in the legal memoranda, we regard the test that we must meet as the Sonesta test and we are prepared to accept the implications on the law review article by Judge Mulligan, to which you made reference the other day, as affecting it. I think that's a fair statement.

I believe even assuming for a moment that that is the test, we have to show in essence substantial constitutional issues and irreparable or the threat of irreparable injury. I believe we satisfied that test in either of the two formulations that appear in this Sonesta case

Essentially we have a case here which I believe the testimony already shows -- even before we get to the testimony, we have Count 1 of a complaint which on its face has a statute which I think is in deference, I believe, on constitutionable grounds. We have, I would submit, turning to Count 1 of our complaint, we have a statute here which I believe is in deference, I believe, on constitutional grounds standing by itself; however going beyond the statute on its face and the manner in which it's implemented, there are perhaps some serious problems but at least I think the least one might say from the testimony we've heard here is that the whole business is administered in a very, very arbitrary way, particularly with respect to when, how and whom the rights would be handed out.

As I was coming back from lunch, two analogies went through my mind. One is from Gilbert and

Sullivan of the famous chancellor who was giving away his wards as prizes with one for he and one for thee.

This business of who will be allowed in and out and who will be allowed to scrap somebody else's rights and who won't, to me is indefensible. I think we have in several areas in this case very, very substantial constitional issues raised and I believe we've raised them in a sufficiently substantial way to meet any test in the first half of the criteria set forth in the Sonesta case.

That gets us then to irreparable harm. Once again, I don't know how necessary it is for me to repeat material that I know you're aware of from our position. I do know that in our brief we pointed out six areas where we maintain irreparable economic injury occurs and in the brief we filed this morning, we touched upon a different area; that is recent cases that also concern a liberty interest arising out of the impact of a determination of death.

All of that is spelled out in our brief which I believe you've read and I don't think I need to take your time rehashing that.

The matters that seemed to be the focus of a lot of attention is this whole business of whether or not somebody is going to get his money back later on if -- not if the determination of death is erroneous merely and not if, whatever they they mean when they say "circumstances warrant a change", no, that man has to not only be determined dead wrongfully or inaccurately or erroneously, but then he has to survive and then he has to escape, be accounted for and returned voluntarily by somebody, a whole series of highly unlikely or difficult -- I withdraw the word "unlikely" because I don't wish to speculate about it, but certainly a great many additional barriers have to be faced before all of this comes up.

The essence of it is this: I believe we have shown in a satisfactory way for present purposes in our brief that the proposed policy of repaying these men at that time is in fact unlawful. I believe it is and I think I've shown it.

I think the whole business of setting up policies and directives and a lot of other informalities that can change from day to day do not remedy the fact that it can't be done and furthermore, even if it did, just as those policies can be changed today, they can be changed tomorrow. They don't add or diminish the problems. They add to them.

We have a set of regulations here. Those regulations are what bind and govern what goes on. What somebody does in terms of policies and directives and a lot of other informalities, letter writing don't impress me.

I think in the long run they won't impress anybody.

There is irreparable harm or at least the threat of it and I think the threat of it is the point we have to talk about. It's there. Under those circumstances without -- I don't think it's necessary for me to go any further. I think our papers augment what I've said. I believe we have met every test that should be met on a preliminary injunction motion.

I may, however, address the matter of dismissal. I find the dismissal, 12-B motion difficult to believe.

THE COURT: Is it your position that you have other substantial evidence that I haven't heard that I should hear?

MR. FOLEY: My position is simply this: I showed you the best I have at the moment. I showed you the areas where I believe I'm going to get more -- evidence of what, you're talking of injury?

THE COURT: Evidence to support your claim for relief.

MR. FOLEY: Yes, I don't think that I've got all the evidence in this case.

THE COURT: What else are you going to show?

MR. FOLEY: There is where a major difficulty arises; that is, how can I forecast in detail what the testimony will be because if I could I wouldn't need discovery.

THE COURT: You've been living with their case for years. What are you going to prove you haven't proved already.

MR. FOLEY: Essentially, evidence to support the range of conclusions stated in my complaint as to the arbitrariness, the inaccessability to documents, the deficiencies in the notice of the hearing itself, all of those things are going to be established --

THE COURT: Realistically you've given me your best case.

MR. FOLEY: I don't think I have.

THE COURT: What have you got?

MR. FOLEY: I have not given you my best case. As we go out we'll get many more. I happened to pick the handiest ones and put them here, they happened to be at random.

THE COURT: I can't continue the matter indefinitely.

MR. FOLEY: I wouldn't want you to.

May I get on to something now? I'm glad you used the word "indefinitely". I don't have anything indefinite in mind.

THE COURT: What kind of evidence could you -- do you think you're going to show you haven't shown? I don't understand.

MR. FOLEY: When you say "kind of evidence", the evidence we will have shown will perhaps be typical of what will come along. There will be supplementary evidence. It will be broadened, it will be extended.

I think as that happens you will find inevitable the new aspects will come into it. I think essentially what I said in the complaint, I think, we put in the bare bones of it in this record; that is with respect to Counts 1 and 2 -- with respect to Counts 2 and 3. Count 1 is something else. I don't think that that is a matter that pertains to evidence at all. That's a matter of a statute, either as good or no good on its face.

I don't think, as a matter of fact, that creates a rather interesting question. When we're dealing with a 12-B motion under Defense No. 6 of 12-B, which is the only conceivable one that I could imagine they are talking about. They don't say which one; that must have been it.

That is treated as a motion for summary judgment. The traditional view, it opens the door to go either way. I think on the face of the statute the Court could and I will submit, very well should consider on the the basis of the face of the statute alone, that it is a summary judgment case in plaintiffs' favor and granted, I would say that certainly would do a number of things that would be rather interesting.

If, in granting it, the statute was avoided and we could try to create something decent thereafter that would be acceptable all around, it would also obviate --

THE COURT: Are you saying to me that you're prepared to have the Court rule on a motion for summary judgment without submitting any further papers?

MR. FOLEY: What I said was this: When a motion for summary judgment -- in effect a motion for summary judgment was presented by the Government, among the ramifications that arise from that is this business of opening the doors to consider it from both points and on the basis of Count 1 of the complaint alone, I think, yes, it could be done.

I'm not, of course, prepared to close the door and consider Count 2 and 3 without further discovery. I think that is absolutely necessary and by the way I think not only the rules but also Schoenbaum vs. Firstbrook indicate it should be done.

THE COURT: I'm not going to grant the motion to dismiss, but I'm not going to grant summary judgment, but the Government is directed to make a motion for summary judgment on the papers and the record thus far presented returnable within 30 days and you can respond.

(Continued on next page.)

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MR. FOLEY: Is there anything further? Is that the order of the Court in response to the two motions?

THE COURT: No, it's only with respect to the motion to dismiss. I'm reserving decision on the motion to dismiss. I'm asking the Government on the basis of the papers already submitted and whatever you want to supplement, to make a motion within 30 days from summary judgement and then the plaintiff will have an opportunity to respond.

The reason I'm doing that is I don't want to cut the plaintiff off from an opportunity to respond to the motion.

MR. FOLEY: I would also like to have an opportunity to participate in discovery during that period of time.

THE COURT: What do you want to discover?

MR. FOLEY: Two main areas that I'm interested in right now would be the deposition of Dr. Shields and those to whom he would lead me, and the second thing is the discovery of document, and essentially those are pretty well described in the schedules annexed to the Shields subpoena.

THE COURT: You can depose Shields in Washington if you want.

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MR . FOLEY: That's what I would suggest.

THE COURT: I don't think you can do anything else, jsut depose Shields.

MR. FOLEY: All I can say is I'll do my best.

THE COURT: Very well.

MS. BUCK: Obviously, your Honor, the Government opposes a continuation, or what would be a preliminary entry of a preliminary injunction. We do this on two grounds; one that the plaintiffs have not satisfied the first prong of the testimony. They cannot show probable success on the merits with serious questions, nor can they show irreparable harm. I think although we disagree with pretty much everything that the plaintiffs set forth here, the initial problem is that we do not see, as they seem to see, the existence of property interest that would be affected by an adverse determination. I think it has been shown during the course of the hearing that these men, if and when they return, would get all the financial benefits to which they're entitled, their salary, promotions, their interest, if accounts were erroneously paid out, that money would be returned to them. Ohter than those financial interests, the Government sees no other interest that these individuals have under the Constitution.

The plaintiffs have argued at several points the existence of rights under the Paris peace treaty. The Government can find no case which supports that argument. Furthermore, there's little question that the status determination in this case, would have no effect on the accounting or the obligation of the Government to account for these men. I think that was shown during the course of the hearing.

Even assuming there is some sort of property interest which the plaintiffs have not identified, the Government feels that that interest would be adequately protected by the procedures that were presently afforded. In every instance someone gets notice and opportunity to be heard. If it's not that individual who is receiving benefits, it would be someone else who would be having a right to come forward and oppose the status determination.

The plaintiff, of course, indicates if you waive that status, that right, that individual is left defenseless, but I think the problem here is that we're confusing the interests of the MIA with necessarily a hearing. It may very well be that, and I think it's been shown in the past that people have fought status determinations and have come to the conclusion that the evidence does not support a finding that these men are still alive. It doesn't necessarily mean because somebody waives a status hearing that their interests are antagonistic to the interest of the MIA.

Furthermore, in every instance an independent determination is arrived at. The Government, I think, the individuals who testified for the various services indicated they just don't rubber stamp a request for a status change, but what they do is indpenedently evaluate the evidence and see whether it's reasonable to presume this man is still alive.

The plaintiffs have also argued they're entitled to the procedures which were afforded in Goldberg vs. Kelley, but I think history bears out that is the only situation where the Supreme Court held that individuals were entitled to such extensive rights and in that situation, that situation is markedly different from the present situation, and in that situation we were faced with the brutal need of the recipient for hearing rights, and clearly that's not present. Anything, any injury that might occur at this point, and the Government doesn't see that any would occur, could be rectified on the individual's return. Even if the Government were not to afford these individuals the rights we now say we would afford them, there is a Corrections Board which can correct any records and rectify whatever errors have been made, including reimbursement of salary, etc., also the Court of Claims. So that it can hardly be said these men are without remedies in the event they return.

The second prong of the standard, the second prong that the plaintiffs would have to show would be irreparable injury. I think we've shown they can't show irreparable injury. Furthermore, there's a number of families who want status determinations. Admittedly they're not as vocal, but most of them seem -- I think it was documented in the hearings, Montgomery hearings, and we submitted a lot of these families want status determination, but they don't want to be put in a position to be asking for it. They feel it's the Government's responsibility to make the status reviews. We agree and would like to proceed with that.

THE COURT: The following represents the Court's finding of fact and law on the temporary restraining order and preliminary injunction.

All Americans owe a great debt to these plaintiffs who are listed here as missing in action. Their next of kin and relatives and friends have suffered exquisite, almost unbearable pain by the loss of presence of their loved ones in uncertainty about their death, wounding or conditions of captivity and their possible futility.

Those of us who served under fire and lost comrades and friends would do all within our power to help those who are now listed as MIAs. That's true of all Americans. Their brothers in service were conducting these hearings, are all experienced combat veterans and there is no reason to believe that they would do less.

Based on the record thus far presented, the Court, as I think any dispassionate observer would have to find, finds a compassionate regard for the rights of these MIAs and those they left behind. It is apparent the presidential actions to review these cases was based partly on letters such as those of Joan Vinson which are in the record, and the report for the Select Committee on missing persons from Southeast Asia and in the United States House of Representatives.

I shall not quote from either of these documents because I believe it would be too painful to those who are present and would have to hear these words, which is so lacking in hope, although all of us, including the writers of those documents, I'm sure, share the hopes of these plaintiffs here.

There's nothing in the record showing the slightest hint that the Government has been less than fully sensative to the rights and the sensabilities of those missing in action and those who seek to represent them. That doesn't mean that at times these parents and wives and children have not had documents that perhaps should have been shown to them, and undoubtedly at times people were sharp with them that shouldn't have been sharp with them, and perhaps some documents should have been unclassified earlier that weren't unclassified earlier, but I've read all of the documents, including the top secret and secret documents and I can only conclude that the Government has done all within its power to be fair and open. To the extent consonant with national security and these people. There's no indication at all that any legal rights or any moral obgligations to these missing in action men or their relatives have been in any respect violated.

The record demonstrats the plaintiffs can prove no facts based on the evidence already submitted that

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would entitle them to relief. To continue the temporary restraining order would raise false hopes of the possibilities with respect to the ultimate success of this suit and do a disservice to those who wish the proceedings to go forward, including the Government of the United States.

With respect to the technical aspects of the suit, the possibilities of success are minimal. For one thing, it's highly doubtful that following the decisions in McDonald vs. McLucas, and the appeal to the Supreme Court, that any further action lies. In effect, I think it can be argued with considerable force that this suit is an attempt to circumvent the decision in those cases. It should be noted the class in McDonald as described on page 838 of 371 F. Sup. is extremely broad. It includes as next of kin, spouses, children, parents, brothers and sisters of MIA, whether or not they were receiving benefits. The fact that the Supreme Court affirmed, in effect constitutes an affirmance of the decision below that; only a limited group that is entitled to challenge this statute, that limited group having been set out in McDonald as those essentially who were receiving benefits.

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I've read the briefs and I've read the application to the Supreme Court and I have to, it seems to me in fairness I believe that McDonald is dispositive. I believe McDonald is also dispositive with respect to the form of the hearing because the form of the hearing was raised in the Supreme Court brief in McDonald, and in effect it was ignored by the Supreme Court itself and the Supreme Court affirmed.

In addition, we have the situation that if anyone receiving benefits is cut off, that person can, in effect, challenge an administrative determination in the Court of Claims. We have that in the Krone case. 538 Fed. 2d 875, giving the right to review unfavorable adjudications concerning people who did receive benefits.

So far as the MIAs are concerned, and that's explicitly what this suit is about, the Government has proved on the basis of the record so far to the Court's satisfaction that the MIAs will not be placed in any inferior position should it be shown that they are alive. The Government has been extremely generous in its handling of a person who is declared missing in action or killed in action and subsequently was found to be alive. I credit completely the testimony and documents in the record indicating that if any person, whether he's carried as missing in action or killed in action should ultimately be shown to be alive, that person will get all the benefits he would have gotten had he been carried alive at all times, and that includes such benefits as considering the money he would have earned during this period would have been placed in his savings account and credited at 10 percent interest.

Moreover, although the Government has no obligation whatsoever to do so, it has agreed, as I understand and I credited the testimony that should any money be paid out which is now in accounts, and should the person return and should there be a falling out between the person who returns and the spouse, let us say, who took the money and spent it, that the Government will replace that; in other words, pay him twice. So that it seems to me the hypothetical miniscule suggestion that there will be any damage to these MIAs is completely without merit.

The Government has done a great many things which is subject to criticism, perhaps, in connection with the Vietnam war, but it's generosity to these men and properly, and in sensitivity to the needs of these men and their families has been extreme. I don't believe any criticism of the Government in this respect is justified. I say that with the understanding of how deeply some of the families feel, how difficult it is to accept the possibility of death.

With respect to the claim that the Government will as a result of a reclassification from missing in action to killed in action fail to press the Vietnamese and the other Southeast Asian nations for reports on missing servicemen, I am utterly convinced by the [illegible]ce both orally and written before me that our Government will make no distinction whether or not somebody is reclassified from missing in action to killed in action. The evidence is overwhelming that they will continue to insist on a full accounting and the evidence is overwhelming insofar as these foreign governments are concerned, they will not make less of an accounting whatever our classification may be. As far as what happens abroad and what we do with respect to our foreign relations and pressing the rights of these MIAs and their families, I don't have any doubt that based on the evidence that will go forward full speed. In fact, we actually had taped by telephone some testimony because one of the people going abroad to continue to press for these matters couldn't be here. He was about to leave today.

It doesn't seem to me there is on the basis of the record thus far made, any reason to continue the temporary restraining order and it is released. I see no reason for a preliminary injunction because I see no substantial reason to believe that a cause of action or claim for relief can be proven or that there will be any irreparable harm to these plaintiffs. I'm allowing the plaintiffs, however, to take the deposition of another person and instructing the United States to make a motion for summary judgement within 30 days so that we can dispose of the matter finally, at least at this level, and so that the plaintiff will be assured, or relatives of the plaintiffs -- the plaintiffs, of course, are unaware of what is happening. They're missing in action or dead; so that the people acting on behalf of the plaintiffs can have the assurance that we have done all that we could.

There are limitis to what we can do in the courts, and there are limits to what we can do in administrative proceedings.

In reviewing many, many administrative proceedings, I have never seen such a uniformly fair method of procedure. That doesn't mean in the past mistakes weren't made. As matters now stand, I just don't have any doubt there will be inadequate testing, inadequate hearing, and if there's any question of a substantial nature with respect to whoever, if somebody is still alive, there will be a determination in favor of the person requesting a hearing.

Are there any other findings of fact you wish at this time? You may wish to take an appeal.

MR. FOLEY: Your Honor, I would wish to have -- frankly, of course, first of all, I do request that the temporary restraining order be extended during this 30 day period because I believe actually no injury during that time will occur to anybody.

THE COURT: Denied. There are widows and others who may want to go forward. In any event, the Government is entitled to go forward. I'll continue the stay until the next motion date which I think is Tuesday. You can make a motion Tuesday, but I won't go beyond that. You'll have to get your relief from the Court of Appeals.

MR. FOLEY: Yes, sir.

THE COURT: Until Tuesday at 5:00 o'clock, no longer.

MR. FOLEY: The second point I wish to raise, your Honor, is with respect to what we are permitted to do during this period of time. The record has demonstrated that Dr. Shields is no longer in the Defense Department as of very recently, and consequently doesn't have access to the document he did have access to a matter of a short time ago. His testimony may be rendered less meaningful because of failure or inability to obtain access to documents. Consequently, I wish to get a direction from the Court the document necessary for his testimon will be made available to that his testimony can be more reasonable.

THE COURT: I see no reason not to do that. That will be done.

Any requests or findings by the Government?

MS. BUCK: No.

THE COURT: Thank you. I'm very sorry, Ladies and Gentlemen, but I really don't think there's a case. I know how painful this is for you parents and wives, but there's nothing I can do.

MR. FOLEY: Can I just clarify one thing? I think it would be good for the sake of the individuals -- who are involved in the case, I think everyone wishes that we were not. I think that's a fair statement. It cuts very deeply into the lives and minds and hearts of people. I would just like to ask your Honor to consider adding to the record a statement that your mind is open and that you will see what happens when we come back with our proof.

THE COURT: I'm only ruling on the matter before me. As a matter of fact, the temporary restraining order and preliminary injunction is to be granted -- if my mind was closed and I was going to rule on the final judgement, I would rule today.

MR. FOLEY: I did wish to get something in the record because I would like the families to know that it's a question just of a decision being made now based on what occurred in the last few days here.

THE COURT: I know. It would be wrong for them not to understand that one of the issues before me is whether there's any substantial chance for success. I'm now ruling that you have not shown a substantial chance for success. That's the situation.

MS. BUCK: Your Honor, there is one point. Mr. Foley indicated that Dr. Shields might not recall various things unless he had documents available to him. We would like to make it clear, or get a clarification that we would be more than willing to give Dr. Shields what they think is necessary. However, we would like to know what obligation. Is the Court ordering us to give Mr. Foley the extensive --

THE COURT: I'm not making any further ruling on it.

MR. FOLEY: Judge, we can cross that when we get to it if it's a problem. I'm not sure it will be.

THE COURT: Thank you very much.

* * * *

I N D E X

WITNESSES	Dir.	Cross	Redir.	Recross
Karen L. Martin	375	398	405	
Raymond A. Vohden	408			

PLAINTIFF'S EXHIBITS		For Iden.	In Evid.
32	Document		415
33	Document		415
34	Document		415
35	Document		416
36	Document		416

PLAINTIFFS' EXHIBIT 4 - LETTER FROM COLONEL A. W. GRATCH TO MR. & MRS. JOHN M. O'GRADY DATED 24 FEB 1977

DEPARTMENT OF THE AIR FORCE
HEADQUARTERS AIR FORCE MILITARY PERSONNEL CENTER
RANDOLPH AIR FORCE BASE, TEXAS 78148

24 FEB 1977

PLAINTIFF'S
EXHIBIT
4
77C1993

Mr. and Mrs. John M. O'Grady
110 Caton Avenue
Brooklyn, New York 11218

Dear Mr. and Mrs. O'Grady

This is to advise you that a review in the case of your son, Colonel John F. O'Grady, will be held to determine whether his missing in action status should be continued or changed to killed in action. This review is for the purpose of assisting the Secretary of the Air Force or his designee in determining what action he should take in this case. The central issue in this review is whether there is any longer a basis for a reasonable presumption that the Air Force member is alive. All information available will be carefully considered during this review.

If you have any questions concerning this letter, please feel free to contact us.

Sincerely

A. W. Gratch
A. W. GRATCH, Colonel, USAF
Asst for Casualty Matters

AMERICAN REVOLUTION BICENTENNIAL 1776-1976

PLAINTIFFS' EXHIBIT 5 - LETTER FROM CAPTAIN THEODORE E. BROM, JR. TO MR. JOHN O'GRADY DATED 7 MAR 1977

DEPARTMENT OF THE AIR FORCE
HEADQUARTERS AIR FORCE MILITARY PERSONNEL CENTER
RANDOLPH AIR FORCE BASE, TEXAS 78148

7 MAR 1977

PLAINTIFF'S
EXHIBIT
5
77 C 1993

Mr. John M. O'Grady
110 Caton Avenue
Brooklyn, New York 11218

Dear Mr. O'Grady

Regarding your 7 March 1977 telephone request to Colonel Gratch that a hearing be held in the case of your son, Colonel John F. O'Grady, I am responding in order to further relate the rationale on which the denial of your request is based.

In accordance with the McDonald vs McLucas class action suit court decree, the services are enjoined from making status determinations unless the next of kin "currently receiving governmental financial benefits, which could be terminated by a status review, are given notice of a status review and afforded a reasonable opportunity to attend a hearing... And it is further ordered, adjudged, and decreed that the procedure set forth in the ordering paragraph immediately preceding need only be applied to those next of kin currently receiving governmental benefits which could be terminated by a status review, who demand it after notice." As you can see, the law clearly defines those who are guaranteed the right to demand a hearing. In this case, since you are currently receiving no governmental financial benefits, the right to demand the hearing option is vested solely in the missing member's wife. This right was waived by the member's wife, and a status determination in your son's case has been subsequently considered by a duly appointed review board. Since there are no provisions under the law which obligate the Air Force to recall this case in order to comply with your request and since all required due process has been afforded, we, therefore, respectfully disallow your request.

In addition to the above rationale, I feel it is important to note that the law governing status determinations has proven adequate and reliable since its enactment in 1942. It has been supported by both Congress and the courts throughout its long tenure. Although the McDonald vs McLucas class action suit brought about the change addressed previously, the basic law itself was sustained in the follow-on Crone vs U.S. suit decision (1976) wherein the US Supreme Court, in effect, upheld the validity of all status changes made prior to the institution of the above due process provision. The recent House Select Committee also concluded, after its comprehensive 15-month study "That the current legislation... adequately protects the rights of the missing persons and their next of kin."

Lastly, I wish to assure you that each status determination, regardless of the method (hearing or review) used, is conducted sensitively, in full consideration of the requirements of law, and with due regard to the interests of all concerned parties. A review board, as in this case, is comprised of senior Air Force officers selected for their expertise in legal, operational, and other fields related to casualty resolution. Those participating in status determination proceedings are responsible for administering the law and do not take their responsibility lightly. Appointments to the boards are limited to those whose proven experience and judgment will insure that a just and proper conclusion is reached and that the interests of not only the member, but his family, and the Government are protected.

If you should have any further questions or if we can be of assistance in any other way, please do not hesitate to contact us again.

Sincerely

Theodore E. Brom Jr

THEODORE E. BROM, JR., Captain, USAF
Chief, Missing Persons
Casualty Matters

AFMPC/DPMSC
RANDOLPH AFB TX 78148

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U.S.MAIL

Mr. John M. O'Grady
110 Caton Avenue
Brooklyn, New York 11218

AMERICAN REVOLUTION BICENTENNIAL 1776-1976

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PLAINTIFFS' EXHIBIT 6 - LETTER FROM COLONEL J. G. LUTHER TO MRS. MICHAEL J. BOSILJEVAC DATED 30 SEP 1973

DEPARTMENT OF THE AIR FORCE
HEADQUARTERS UNITED STATES AIR FORCE
WASHINGTON, D.C. 20330

REPLY TO ATTN OF: AFMPC/DPMSC
RANDOLPH AFB TEXAS 78148

30 SEP 1973

PLAINTIFF'S EXHIBIT
6
77C 1793

Mrs. Michael J. Bosiljevac
8317 South 49th Street
Omaha, Nebraska 68157

Dear Mrs. Bosiljevac

This is to advise you that a final status determination cannot be made in the case of your husband, Captain Michael J. Bosiljevac, after his year's absence, and that he is to be continued in a missing in action status.

The recording and changing of the status of missing personnel are controlled by Sections 551-558, Title 37, United States Code (USC). Section 555 of this law applies to your husband's case and it requires a full review of all facts and circumstances when a twelve months' period of absence in a missing in action status is about to expire. It authorizes either a continuance of the missing in action status or a presumptive finding of death.

Notwithstanding the foregoing provisions of law, we are faced with the fact that the US Federal District Court, Southern District of New York, on 6 August 1973, issued a temporary injunction preventing the Secretaries of the Army, Navy, and Air Force from making status determination changes except upon written request of primary next of kin. This injunction will remain in effect until a three-judge federal court hears and decides a class action suit brought by next of kin and friends of several of the missing in action (MIA) personnel. The suit alleges that the law under which status determinations are made is unconstitutional but that if constitutional it has been administered in an arbitrary and capricious manner.

So long as the temporary injunction remains in force, the Services may not make any official report of death or any finding of death pursuant to 37 USC 555 or 556 with respect to any member who was on 20 July 1973 in a missing status in Indochina except that they may: (1) proceed under 37 USC 555 or 556 as to any MIA if they receive from the primary next of kin a request in writing that they not delay action on the information in their possession; (2) continue to initiate any activity for the purpose of obtaining information about any MIA; (3) communicate any information so obtained now in their possession or hereafter acquired; (4) respond to any unsolicited inquiry from any family of any MIA not related to the allegations or merits of the class action suit; and (5) deliver the possessions or remains of any MIA to the primary next of kin.

Our repatriated personnel have completed their debriefings and no information was gleaned concerning your husband, except that obtained from his pilot. Although he knew of the events which led to your husband's disappearance, and was informed by a North Vietnamese guard that Captain Bosiljevac was there, neither he nor any of the other repatriates could offer evidence to establish that your husband was ever a prisoner of the North Vietnamese or of their allies. Some word should have been received from or about him in the prisoner communication channels, which have proven reliable, if he were still alive.

You may be assured that you will be notified immediately should any information be received or other developments occur regarding your husband. In the meantime, his pay and allowances will continue to be credited to his account and allotments will continue to be paid to authorized allottees.

I realize how disheartening it is to be without definite information concerning the fate of your husband and hope with you that his true status may soon be resolved.

Sincerely

J. G. LUTHER, Colonel, USAF
Chief, Casualty Services
Asst DCS/Personnel for Mil Pers

PLAINTIFFS' EXHIBIT 7 - DOCUMENT DATED SEPTEMBER 24, 1973 ENTITLED "SUBJECT: CONTINUATION OF MISSING IN ACTION STATUS BEYOND TWELVE MONTHS"

DEPARTMENT OF THE AIR FORCE
HEADQUARTERS UNITED STATES AIR FORCE
WASHINGTON, D.C. 20330

REPLY TO ATTN OF: AFMPC/DPMSC
RANDOLPH AFB TEXAS 78148

24 SEP 1973

SUBJECT: Continuance of Missing in Action Status Beyond Twelve Months - Case #461

PLAINTIFF'S EXHIBIT
7
11 C 1993
PENGAD-Bayonne, N.J.

TO: AF/DPM

1. Personnel Involved:

a. Pursuant to the provisions of Chapter 10, Title 37, United States Code (USC), a full review has been made of the facts and circumstances set forth herein to determine whether the missing in action status of Captain ~~Michael J. Bosiljevac, 505-56-8657FR, may~~ reasonably be continued after a year's absence or terminated by a presumptive finding of death.

b. The status of the pilot, Lieutenant Colonel James W. O'Neil, 566-32-1515FR, is not being considered as he was captured and returned to military control during Operation HOMECOMING.

2. Circumstances: Captain Bosiljevac was the electronic warfare officer and Colonel O'Neil was the pilot of the lead aircraft in a flight of four F-105s which departed Korat Air Base, Thailand, at 1206, 29 September 1972, on a combat mission over North Vietnam. At approximately 1325 a surface-to-air missile damaged the lead aircraft and it became uncontrollable. Captain Bosiljevac and his pilot ejected, and their fully deployed parachutes were observed until they disappeared into a low cloud layer. Shortly thereafter, voice contact was established with the pilot, but his transmissions were difficult to understand. When asked about Captain Bosiljevac's status, his reply was not understood. Voice contact was then lost and could not be reestablished. No contact was ever established with Captain Bosiljevac and no emergency electronic signals were received from him. The incident occurred about 24 miles west of Hanoi in a hilly area. Rescue forces were alerted, but hostile activity prevented them from entering the immediate search area. During the remainder of the day and the succeeding two days adverse weather conditions and hostile activity hampered visual reconnaissance efforts and, when no evidence had been secured on which to base further search efforts, the organized search terminated on 1 October 1972.

3. Supplemental Information: During his debriefing Colonel O'Neil revealed that he was about a quarter-mile away and one thousand feet above Captain Bosiljevac as they descended in their parachutes. He was able to observe Captain Bosiljevac several times as they descended, but his observations were brief as his parachute was rotating. He noticed that Captain Bosiljevac's parachute had been modified, which is known to require manual effort, and his life vest was inflated.

No actual movement by Captain Bosiljevac was observed. Instead, his head was bent down and he appeared to be hanging in his parachute. No ground fire was observed in the area. After reaching the ground Colonel O'Neil saw Captain Bosiljevac's collapsed parachute canopy, life preserver, and life raft strung out in a line on the ground in an open area. An intervening ravine prevented closer inspection, and he could not tell whether Captain Bosiljevac had been removed or was still in his parachute. He was also unable to establish radio contact with Captain Bosiljevac. On 5 October 1972, after being captured and taken to Hanoi, Colonel O'Neil asked a guard about the status of Captain Bosiljevac. The guard spoke English well and, after securing information elsewhere, he advised Colonel O'Neil that Captain Bosiljevac was there. He believed the guard, as he was straightforward and there was no evidence of evasiveness. During the remainder of his confinement, Colonel O'Neil was unable to secure any information about Captain Bosiljevac, and none of his fellow-prisoners had seen or heard from him. He then realized that information given him by the guard might have been for the purpose of influencing him in some way.

4. Discussion: Evidence of record indicates that Captain Bosiljevac was apparently alive immediately after ejecting from his aircraft. Despite this, the likelihood that he is still alive may no longer reasonably be considered, since he was not repatriated, his name never surfaced in the prisoner communication channels, and sufficient time has elapsed during which it is believed some word would have been received if he were still alive. The fact that Colonel O'Neil was captured and repatriated gives added weight to the assumption that the same would have happened to Captain Bosiljevac if he had survived. Since the information related to Colonel O'Neil by the North Vietnamese guard is hearsay and devoid of details, there is no way to determine its validity. (It is not possible to conclusively establish Captain Bosiljevac's ultimate fate because further details concerning him have not been received.) While this is an appropriate case for a presumptive finding of death, such a determination cannot be made at this time. The US District Court, Southern District of New York, on 6 August 1973, enjoined the services from making status changes unless the primary next of kin requests in writing that the Air Force not delay action on information in its possession. We have no such request. Accordingly, there is presently no alternative but to continue Captain Bosiljevac in a missing status.

5. RECOMMENDATION: Pursuant to the authority contained in Section 555, Title 37, USC, and following the mandatory review of all available information on this date, it is recommended that an official casualty report be issued stating that Captain Michael J. Bosiljevac, 505-56-0057FR, will be continued in a missing in action status following the expiration of twelve months' absence, effective 30 September 1973.

Signature	Typed Name & Grade
A. W. Gratch	A. W. GRATCH, Colonel, USAF
J G Luther	J. G. LUTHER, Colonel, USAF
M. E. Kosa	M. E. KOSA, Colonel, USAF
[illegible] B Dettinger	G. B. DETTINGER, Colonel, USAF, MC
B. L. Davis	B. L. DAVIS, Brigadier General, USAF

30 SEP 1973

Under the authority delegated by the Secretary of the Air Force to the Assistant Deputy Chief of Staff, Personnel for Military Personnel, or the officer acting in his stead, the above recommendation is approved.

TRMcNeill

T. R. McNEILL
Major General, USAF
Asst DCS/Pers for Mil Pers

PLAINTIFFS' EXHIBIT 8 - LETTER FROM MAJOR GENERAL L. W. SVENDSEN, JR. TO MRS. MICHAEL J. BOSILJEVAC DATED 16 AUGUST 1977

DEPARTMENT OF THE AIR FORCE
HEADQUARTERS AIR FORCE MILITARY PERSONNEL CENTER
RANDOLPH AIR FORCE BASE, TEXAS 78148

16 August 1977

MRS. MICHAEL J. BOSILJEVAC
8317 SOUTH 49TH STREET
OMAHA, NEBRASKA 68157

DEAR MRS. BOSILJEVAC

The decision has been made to resume status reviews on those men who remain missing in action or prisoners of war as a result of the Southeast Asian conflict. The Department of Defense plans to announce this decision on 18 August 1977. A copy of the announcement is attached.

Another newsletter will be sent to you later explaining the status determination process. If you have any questions, however, please do not hesitate to contact Colonel A. W. Gratch or Major T. E. Brom, Jr. at our toll free telephone number 1-800-531-5501 from any location outside of Texas. Within Texas, call collect at area code 512, 652-3505. Please be assured we will keep you advised of any new information or future developments.

Sincerely

L. W. SVENDSEN, JR.
Major General, USAF
Asst DCS/Pers for Military Personnel

1 Atch
News Release

PLAINTIFF'S EXHIBIT
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PENGAD-Bayonne, N.J.

AMERICAN REVOLUTION BICENTENNIAL 1776-1976

A-763

SERVICES TO RESUME STATUS REVIEWS ON US SERVICEMEN UNACCOUNTED FOR IN SOUTHEAST ASIA

Service Secretaries will resume status reviews of the cases of US servicemen still listed as prisoners of war or missing in action as a result of the Southeast Asian conflict. Status reviews are individual case-by-case investigations prescribed by law to determine if a serviceman should be continued in a captured or missing status or reclassified as deceased. Status reviews, except those requested by the next of kin, had been halted since mid-1973 due to litigation and pending investigations of the problem by the US Government.

The determination to reinstate status reviews follows unprecedented efforts by the Executive and Legislative Branches to account for missing US servicemen. These included a Congressional Committee investigation, a Presidential Commission and diplomatic approaches by the State Department. Although there is no credible evidence to indicate that any US servicemen are alive and being held against their will in Southeast Asia, each case will be thoroughly reviewed on its own merits.

This action in no way alters the US Government's intent to obtain as full an accounting as possible of our servicemen, whether missing or deceased. Status reviews and obtaining an accounting are two distinct issues. Negotiations with the Southeast Asian governments will continue with the goal of receiving as much information as possible on all unaccounted servicemen. The casualty status of an individual will not affect our attempts to account for him. In fact, much of the specific information received from Vietnam or obtained as a result of our own efforts has concerned personnel who had been classified as killed.

The Secretaries of the Military Departments are specifically charged by statute with responsibility for status changes and for insuring that each case is reviewed exhaustively before any determination is made. The law, as written, has been upheld by the courts, and a House Select Committee determined after 15 months of hearings that it adequately protects the rights of the missing persons and their next-of-kin. The law states: "...the Secretary concerned, or his designee, shall, when he considers that the information received, or a lapse of time without information, establishes a reasonable presumption that a member in a missing status is dead, make a finding of death." This law has evolved from the experiences of three wars and has been effectively and equitably administered during, and after those conflicts. After World War II and the Korean War, all MIA classifications were terminated within a year of the end of hostilities.

atch 1

The Service Secretaries will conduct all aspects of casualty matters with full respect for the rights of the missing members, with compassion for the families, and in accordance with the law. The procedure for status reviews includes a board of qualified personnel who are thoroughly familiar with that Service's combat operations in Southeast Asia, which reviews the file on each serviceman to determine if a status change is warranted. Next-of-kin of missing or captured servicemen who are receiving governmental financial benefits will be afforded the right of due process. They will be notified in advance that a review of their relative's case is to be conducted; be provided an opportunity to attend the review, with counsel if they so desire; be granted reasonable access to information upon which the status review is based; and be permitted to present any information which they consider relevant to the proceeding. Under these legal requirements, status reviews necessarily will be conducted by the missing serviceman's respective service on an individual case-by-case basis starting with those who have been missing the longest.

PLAINTIFFS' EXHIBIT 9 - MEMO FROM MAJOR THEODORE E. BROM, JR. TO MRS. MICHAEL BOSILJEVAC DATED 19 AUG 77 AND ATTACHED SUMMARY OF FACTS AND CIRCUMSTANCES

DEPARTMENT OF THE AIR FORCE
Headquarters Air Force Military Personnel Center

MEMO FROM
THE OFFICE OF ~~THE DIRECTOR~~ MISSING PERSONS

TO: Mrs. Michael Bosiljevac DATE: 19 Aug 77

Attached is a copy of the Summary of Facts and Circumstances you requested in our conversation of 18 Aug 77.

Theodore E. Brom

THEODORE E. BROM, JR., Major, USAF
Chief, Missing Persons
Casualty Matters

1 Atch
Summary of
Facts &
Circumstances

PLAINTIFF'S
EXHIBIT
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SUMMARY OF FACTS AND CIRCUMSTANCES

1. Captain Michael J. Bosiljevac, 505-56-0057FR, electronic warfare officer, and Colonel James W. O'Neil, pilot, comprised the crew of the lead F-105G aircraft in a flight of four (two F-105Gs and two F-4Es), that departed Korat Air Base, Thailand, at 1206, 29 September 1972, on a combat mission over North Vietnam. There were low clouds and an overcast deck in the target area. At approximately 1325, a surface-to-air missile (SAM) damaged the lead F-105G aircraft and it became uncontrollable. Captain Bosiljevac and his pilot ejected, and their fully deployed parachutes were observed until they disappeared into the low clouds. Shortly thereafter, voice contact was established with the pilot, but his transmissions were difficult to understand and when asked about Captain Bosiljevac's status, his reply was not understood. Voice contact was then lost and could not be reestablished. No contact was ever established with Captain Bosiljevac and no emergency electronic signals were received from him. The incident occurred about 24 miles west of Hanoi, in a hilly, sparsely populated area. Rescue forces were alerted, but due to poor weather, high MIG threat and lack of contact by the rest of the flight with the downed crew, they did not enter the immediate loss area. During the remainder of the day and the succeeding two days, adverse weather conditions and hostile activity hampered visual reconnaissance efforts and, due to negative results, the organized search was terminated at 1840, 1 October 1972.

2. Colonel O'Neil was captured and subsequently repatriated during Operation HOMECOMING. During his debriefing he revealed that he was about a quarter-mile away and 1,000 feet above Captain Bosiljevac as they descended in their parachutes. He was able to observe Captain Bosiljevac several times as they descended, but his observations were brief as his own parachute was rotating. He noticed that Captain Bosiljevac's parachute had been modified (4 line jettison modification) which is known to require manual effort, and his life vest was inflated. Colonel O'Neil saw no actual movement by Captain Bosiljevac, instead, his head was bent down and he appeared to be hanging in his parachute. No ground fire was observed in the area. After reaching the ground Colonel O'Neil saw Captain Bosiljevac's collapsed parachute canopy, life preserver, and life raft strung out in a line on the ground in an open area. A very steep ravine prevented closer inspection, and he could

not tell whether Captain Bosiljevac was still in his parachute, since the flight suit colors blended well with the grass. Colonel O'Neil was also unable to establish radio contact with Captain Bosiljevac. On capture, he was told by his captor he was lucky since he was with the North Vietnamese Military and not local peasants. On 5 October 1972, after being taken to Hanoi, Colonel O'Neil asked a guard about the status of Captain Bosiljevac. The guard spoke English well and, after securing information elsewhere, advised Colonel O'Neil that Captain Bosiljevac was there. He believed the guard at that time, as he was straightforward and there was no evidence of evasiveness. During the remainder of his confinement, Colonel O'Neil was unable to secure any information about Captain Bosiljevac, and none of his fellow-prisoners had seen or heard from him. Colonel O'Neil then realized that information given him by the guard might have been for the purpose of influencing him in some way.

3. No accounting for Captain Bosiljevac was ever received from the North Vietnamese government or its allies, and his name never appeared in the prisoner communication channels which proved to be reliable. In accordance with the provisions of Section 555, Title 37, USC, Captain Bosiljevac was continued in a missing status at the expiration of the initial 12-month period of absence. It was the finding of the board that this was an appropriate case for an administrative determination of death; however, such a determination could not be made because the restraining order that prohibited status changes was in effect at the time. (See class action suit: McDonald vs McLucas)

PLAINTIFFS' EXHIBIT 10 - LETTER FROM COLONEL A. W. GRATCH TO MRS. MICHAEL J. BOSILJEVAC DATED 25 AUG 1977

DEPARTMENT OF THE AIR FORCE
HEADQUARTERS AIR FORCE MILITARY PERSONNEL CENTER
RANDOLPH AIR FORCE BASE, TEXAS 78148

25 AUG 1977

MRS. MICHAEL J. BOSILJEVAC
8317 SOUTH 49TH STREET
OMAHA, NEBRASKA 68157

DEAR MRS. BOSILJEVAC

This is the follow-up as promised in our 16 August newsletter in which we announced the decision to resume status reviews on those men who remain in a missing in action or prisoner of war status as a result of the Southeast Asian conflict.

The purpose of this newsletter is to explain the procedures for making status reviews. These procedures comply fully with the provisions of Sections 555 and 556, Chapter 10, Title 37, United States Code, and satisfy the requirements of the three-judge federal court order (McDonald v. McLucas, D.C.N.Y.) which requires appropriate due process of law.

Generally, the cases will be scheduled for review in the order of loss beginning with the earliest loss. A Summary of Facts and Circumstances, which will be a consolidation of all available information pertaining to the member, will be prepared for each case. This will become the primary source of information for those who will later determine whether the member is being carried in the proper status.

Next, we will write to the primary next of kin and any others who are receiving government financial benefits as a result of the member's missing or captured status. The letter, which will be mailed 21 days in advance of the date the case will be considered, will be advisory in nature. It will explain that one of the following three options is available regarding the conduct of the review:

1. Hearing Rights - The addressee may attend a hearing at Randolph Air Force Base with a civilian attorney, if desired. The time and date of the hearing will be worked out between the next of kin and the Air Force, generally by telephone. A format has been devised for the hearings; however, they are conducted informally. If the addressee chooses to attend, the hearing will be conducted by not more than three senior officers. Technical advisors will be available. The hearing is not intended as an adversary proceeding, and only relevant information having a direct bearing on the possibility of the survival of the member may be introduced at the hearing.

AMERICAN REVOLUTION BICENTENNIAL 1776-1976

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2. Waiver of Hearing - Selection of this option indicates the addressee does not desire to travel to Randolph Air Force Base for a hearing. The case will then be reviewed by a group of Air Force officers similar to that indicated above for a hearing.

3. Waiver of Hearing With Right to Submit Information - Basically, this is the same as the preceding option except that the addressee may submit in writing a summation of any information which should be considered by the reviewing officers in arriving at their recommendation. As with the first option, any information submitted for consideration by the reviewing officers should be confined to that which is relevant to the possibility of survival.

A copy of the Summary of Facts and Circumstances, a form on which the selection of option can be indicated, and a self-addressed envelope for use in returning the form will be attached to the letter. If the third option is selected, the information to be considered by the reviewing officers must be returned with the form. Each case will be reviewed on an individual basis.

Upon completion of the hearing (in the case of the first option) or review (in the case of either of the other two options), each participating officer will sign the recommendation. The Assistant Deputy Chief of Staff, Personnel for Military Personnel who is also the Commander, Air Force Military Personnel Center, and has been designated by the Secretary of the Air Force as the final approving authority for status changes, will review the case before sending it to the Pentagon. At the Pentagon, it will be reviewed and coordinated by the Secretary of the Air Force and members of his staff, and then returned to the final approving authority for action. If the recommendation is made and approved that an administrative determination of death is appropriate, notification is made to the next of kin.

If you are a secondary next of kin not receiving government financial benefits, you may wonder where you fit into the procedures. Should the primary next of kin request a hearing, the secondary next of kin may attend as nonparticipants. If a hearing is waived, the secondary next of kin are advised of the impending review and informed they will be provided the results of the review as soon as possible.

Costs incurred by you as a result of any aspect of this program must be borne by you as there are no government funds available for this purpose.

Let us make one point in connection with the subject of status determinations. Some next of kin feel that a change of status to killed in action terminates the responsibility of the United States Government in obtaining an accounting for the member and to recover his remains. Nothing can be further from the truth. Our government has availed itself of all possible avenues in attempting to resolve the status of all our men who have not returned. It must be noted that of the 23 Air Force members for whom the

Vietnamese have most recently accounted, 10 had been the subject of administrative determinations of death prior to receipt of the accounting. I assure you that our government will continue indefinitely its attempts to gain the best possible accounting for those who have not returned, regardless of their official status, and to recover their remains.

We hope this has given you a better understanding of the status determination process and answered any questions you may have had on the subject. In addition, if you are a primary next of kin or one who receives government financial benefits, it may help you decide which option to exercise when the time comes for that action to be taken.

Sincerely

A.W. Gratch

A. W. GRATCH, Colonel, USAF
Asst for Casualty Matters

PLAINTIFFS' EXHIBIT 12 - ARTICLE APPEARING IN NEW YORK TIMES, SEPTEMBER 30, 1972

E NEW YORK TIMES. SATURDAY, SEPTEMBER 30. 1972

U.S. Sends F-111's Over North For the First Time Since 1968

SAIGON, South Vietnam, Saturday, Sept. 30 (AP)—The United States has sent the controversial F-111A fighter-bomber back into the air war over North Vietnam for the first time in four and a half years.

The United States command reported yesterday that the all-weather swingwing jets, which can carry twice the bomb load of any other fighter-bomber, attacked North Vietnam's northwest rail line and military barracks between Hanoi and the Chinese border.

They joined other fighter-bombers in another heavy day of raids on North Vietnam. In all, the command said, more than 300 sorties were flown across the North for the [illegible] successive day.

The F-111's first entered the war in March, 1968, but were withdrawn several months later after three of the planes crashed. The Air Force says the mechanical problems have now been eliminated.

Effective in Monsoon

The jets were brought back, United States officials said, to increase American air power during the monsoon season that begins next month in North Vietnam. Their intricate radar systems allow them to fly at low altitudes in overcast skies.

The F-111's, which carry up to 29,000 pounds of bombs, flew air strikes Thursday in an area about 55 miles northwest of Hanoi and 100 miles below the Chinese border, the command said. No assessment of damage was given.

The Air Force reported that F-4 Phantom jets attacked a supply facility 25 miles southwest of Hanoi, setting off big explosions and fires.

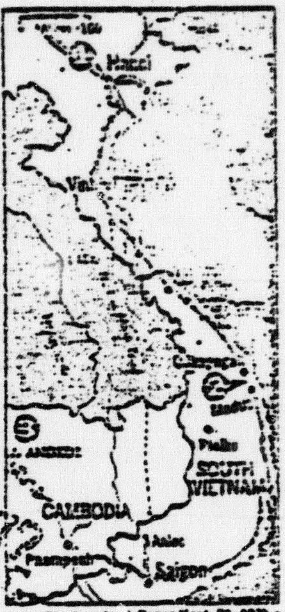
The F-111's were sent immediately into action after arriving at Takhli Air Base in Thailand from Nellis Air Force Base near Las Vegas, Nev.

In the ground war, Saigon troops were reported making progress yesterday in a drive to reopen a stretch of Route 1 along the north central coast of South Vietnam.

The Government troops were said to have pushed the North Vietnamese out of a hamlet along the vital highway in Quangngai Province and were attacking the last force known to be blocking the road.

Route 1 from the provincial capital of Quangngai to the district town of Moduc 12 miles to the south, has been cut since Moduc was attacked by North Vietnamese troops Sept. 16.

North Vietnamese infantrymen were entrenched in a village on the highway, and two columns of South Vietnamese troops were reported closing on the town to root out the air strikes and United States naval gunfire.



The New York Times/Sept. 30, 1972

F-111's, newly returned to the air war, bombed rail line northwest of Hanoi (1). Saigon troops fought to open road near Quangngai (2). Cambodia gave up drive to retake temples of Angkor (3).

The Hanoi radio said that two United States jets were downed over North Vietnam on Friday and that the pilots had been captured.

The command announced that a Marine A-4 crashed from unknown causes Tuesday about 65 miles north of Saigon near Anloc and said the pilot was missing. An Air Force A-1 Skyraider was reported lost Thursday in Laos. The pilot was rescued.

Plane Kills Three

In another crash, a South Vietnamese spotter plane hit a roadside electrical wire and flipped onto a highway about 10 miles northeast of Saigon yesterday. The plane landed on an automobile, killing three South Vietnamese. The pilot and a South Vietnamese youth suffered burns when the aircraft burst into flames.

Angkor Fight Abandoned

PNOMPENH, Cambodia, Sept. 29 (UPI)—The Cambodian command announced that it had abandoned its efforts to recapture the 1,000-year-old temples at Angkor. The operation, begun on Jan. 29, was abandoned Sept. 19, a spokesman announced. It had been almost at a standstill since early August. Enemy units have occupied Angkor since June, 1970.

PLAINTIFFS' EXHIBIT 13 - LETTER FROM CAPTAIN GARY L. ROSEVOLD TO MRS. MICHAEL J. BOSILJEVAC DATED 23 AUG 1973

DEPARTMENT OF THE AIR FORCE
HEADQUARTERS AIR FORCE MILITARY PERSONNEL CENTER
RANDOLPH AIR FORCE BASE, TEXAS 78148

23 AUG 1973

Mrs. Michael J. Bosiljevac
8317 South 49th Street
Omaha, Nebraska 68157

Dear Mrs. Bosiljevac

In answer to your 20 August 1973 request, we have attached a copy of each of the two Foreign Broadcast Information Service reports and are returning your newspaper articles, all of which were a part of our file pertaining to your husband, Captain Michael J. Bosiljevac.

You asked about page 1 of one of the FBIS reports dated 1140 GMT 29 September 1972, which was missing. Although it is not now available we know that the first page contained only a list of the addressees which filled one page.

Please let us know when we can be of further service.

Sincerely

Gary L Rosevold

GARY L. ROSEVOLD, Captain, USAF
Missing Persons Branch
Casualty Services

4 Atch
1. FBIS Report 1140 GMT 29 Sep 72
2. FBIS Report 2235 GMT 29 Sep 72
3.&4. News Clippings

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PENGAD - Bayonne, N.J.

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RUAOJGA/7TH PSYOPS GP OKINAWA
RUDOMKA/FBIS LONDON
RUAGFBA/FBIS TOKYO
RUAOFBA/FBIS OKINAWA
RUADAHA/376TH STRAT WG/DCI
RUADJGA/CGEUSA SEOUL G2
RUADKEA/313TH AIR DIV/AFSSO
RUADKEA/18TH TFW
RUAOLBA/COMNAVFORJAPAN
RHMFMTA/JUSMAG/MACTHAI J2
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RUMFSAA/ALL TG CMDRS TF 77
RUMMOPA/COMAFFIVE/FIWW FUCHU
RUMMWIA/VRC-50 DET CUBI
RUMMWUA/COMNAVFORPHIL
RUMOSRA/DIR INT DEP CMD 7AF/13AF UDORN
RUAOLBA/VQ 1 DA NANG
RUMTBK/AMEMB AND USIS BANGKOK
RHATAAA/COMUSTDEFCOM
RUACADA/USAMGCO SUKIRAN
RUACAFA/CO 623D AC&W SG
RUHHHQA/CINCPAC
RUHHGRA/CINCPACFLT
RUHHRGA/CINCUSARPAC
RUHHABA/CINCPACAF
RUMJFS/AMEMB VIENTIANE
RUMJFS/USIS VIENTIANE
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URUEKJCS/DIA (DC-4)
RUECFIA/CODE DNA WASHDC
RUEBLAN/NAVINTCOM (NIC-38)
RUEADWD/DA WASHDC
RUEAFOK/DA CAS DIV TAGO
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MISSILE DOWNING OF U.S. AIRCRAFT NEAR HANOI DESCRIBED

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CLAS DJC
291200 HANOI DOMESTIC SERVICE IN VIETNAMESE 1140 GMT 29 SEP 72 S

((TEXT)) ACCORDING TO THE LATEST REPORTS, AT 1430 ON 29 PTEMBER THE HANOI ANTIAIRCRAFT TROOPS, MAINTAINING HIGH VIGILANCE D FIGHTING WELL, DOWNED TWO U.S. JETS. THE AGGRESSORS PILOTS AILED OUT AND WERE IMMEDIATELY CAPTURED BY THE LOCAL ARMED FORCES D PEOPLE.

ON 26, 27 AND 28 SEPTEMBER THE ARMED FORCES AND PEOPLE OF NH LINH, QUANG BINH, HA TNH AND NGHE AN DOWNED SIX U.S. RCRAFT, INCLUDING ONE B-52 DOWNED BY THE VINH LINH ARMED FORCES D PEOPLE.

THUS IN THE LAST 4 DAYS OUR NORTHERN ARMED FORCES AND OPLE HAVE DOWNED EIGHT U.S. AIRCRAFT AND CAPTURED THE AGGRESSOR ILOTS.

BETWEEN 5 AUGUST 1964 AND 29 SEPTEMBER 1972 THE NORTH S DOWNED 3,945 U.S. AIRCRAFT. 291140 Y/LAMAR 29/1205Z TH

028

NNN

1-2

(5)

2

S30457 HANOI DOMESTIC SERVICE IN VIETNAMESE 2235 GMT 29 SEP 72 S
((REVIEW OF 30 SEPTEMBER QUAN DOI NHAN DAN))

((EXCERPT)) ((PASSAGE OMITTED)) ON PAGE 1 THE PAPER PUBLISHES A REPORTAGE 'ON THE BATTLEGROUND AT THE WESTERN GATE OF HANOI.'

THE ENEMY WAS COMING IN FROM MANY DIRECTIONS AND RESORTING O MANY EVASIVE MANEUVERS. CLOSELY OBSERVING HIS ACTIVITIES, VAN DECIDED VERY QUICKLY: (? LIGHTING) ATTACK METHOD. '(? LIGHTNING) ATTACK METHOD' WAS ONLY A BRIEF COMMAND. HOWEVER , MAKING THIS DECISION AT THIS MOMENT RESULTED FROM A WHOLE PROCESS OF STUDYING THE ENEMY LABORIOUSLY AND FOR A FAIRLY LONG TIME BY MANY PERSONNEL OF THE DETACHMENT--BOTH CADRES AND COMBATANTS. THIS DECISION WAS ALSO BASED ON THE JOINT CAPABILITY OF THE WHOLE DETACHMENT AFTER MANY DAYS AND NIGHTS OF TRAINING.

AND ON THE NIGHT BEFORE YESTERDAY, THE FACT THAT THE BROTHERS HAD SAYEDD AWAKE FOR MANY HOURS TO FURTHER IMPROVE THE ACCURACY OF THEIR EQUIPMENT MADE A BIG CONTRIBUTION TO OPENING FIRE ACCURATELY AT THE TARGETS.

A SUDDEN EXPLOSION SHOOK THE BATTLEGROUND AREA. THE MISSILE SHOT UPWARD. IMMEDIATELY AFTER THE LAUNCHING THE 2D UNIT OF THE DETACHMENT QUICKLY TOOK THE INITIATIVE TO RELOAD ALMOST AT THE SAME TIME AS THIS DETACHMENT LAUNCHED A MISSILE, A NUMBER OF OTHER ANTIAIRCRAFT BATTLEGROUNDS ALSO OPENED FIRE. THE EXPLOSIONS HEARD FROM VARIOUS BATTLEGROUNDS WERE NOT GREAT IN NUMBER, BUT THEY WERE PAPID AND VERY CONCENTRATED.

IT ALL HAPPENED IN A MATTER OF SECONDS. THE ENEMY AIRCRAFT WAS HIT. IT SPEWED FORTH A BURST OF FLAME, GAINEDALTITUDE WHILE DROPPED THE SPARE FUEL TANK, CONTINUED TO BURST INTO FLAME AND BURN, AND WITH ITS MOMENTUM PASSED OVER THE BATTLEGROUND. THE OBSERVATION POST OF THE DETACHMENT REPORTED [illegible] PARACHUTE--THE AGGRESSOR PILOT PARACHUTED. ON THE BATTLEGROU[illegible] TH MEN COULD NOT HELP THEMSELVES SHOUTING A MERRY CRY [illegible]TORY.

WHILE HAVING URGENT PREPARATIONS FOR OTHER [illegible]LES T COME, ALL THE BROTHERS WERE ALL THE MORE ELATED WHEN [illegible]NFORMED BY THE HIGHER ECHELONS THAT THE U.S. AGGRESSOR PILOT HAD BEEN CAPTURED BY THE ARMED FORCES AND PEOPLE IN AREA Y RPT Y IMMEDIATELY AFTER HIS LANDING. ((PASSAGE OMITTED)) 292235 TU/GILBERTSON

300740 HG.

UT

.0021

PLAINTIFFS' EXHIBIT 14 - STATEMENT OF CAPTAIN ROBERT J. PETTIT. JR.

[redacted]

STATEMENT

UNCLASSIFIED

On 29 Sept 72 I was Crow 02 flying #2 on a Hunter-Killer mission. Downed member was Crow 01 flying #1. Downed member was hit by SAM at 1332L in the vicinity of 21-13N 105-39E.

As Crow 02 we followed Crow 01 for several minutes until it appeared they lost control of the aircraft and ejected. I saw two good parachutes and the seat kits of both individuals deploy. They did not come over on voice transmission during their descent and I saw both of them drift into clouds below my position. I would say that they landed in a hilly terrain. Although I did not personally talk to them on the ground, I heard through the SAR organizer that voice contact was made with Crow 01 "A" with one of the flights that was involved in the SAR and was near their downed position. As our flight returned to the downed crewmembers area after refueling, I heard a garbled and broken transmission when Vega Flight tried to contact the downed crewmembers.

X

I did see him eject. I did see man-seat separation. I did see a good chute. I did hear one (1) beeper. Weather in the area where member is down was broken clouds below. Type of terrain is hilly where they were and sparcely populated.

s/Robert J. Pettit Jr.
t/ROBERT J. PETTIT JR., Captain, USAF, 049-38-8874FR
17WWs 29 Sep 72

"A CERTIFIED TRUE COPY"

HHHayslett Jr
H. H. HAYSLETT JR., Captain, USAF
225-46-3038FV, 388 Cmbt Spt Gp
APO San Francisco 96288 5 October 1972

Duty
2920

PLAINTIFF'S
EXHIBIT
14
92C 1993

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[redacted]

REPRODUCED (17 Dec 72) BY (DPMSC)
REPRODUCED COPY ___ OF 1 COPIES

UNCLASSIFIED

PLAINTIFFS' EXHIBIT 15 - STATEMENT OF CAPTAIN H. H. HAYSLETT, JR.

[redacted]

STATEMENT

UNCLASSIFIED

On 29 Sep 72, I was CROW 2 flying 2 on a LINEBACKER WHISKEY IV mission. Downed member CROW 1 flying Lead. Downed member was hit by SAM at 1332L in the vicinity of PHUCTEN 2113/10539.

Two good chutes were seen descending into a low cloud deck with seat packs deployed. Landing was not observed due to clouds. Beeper was heard during descent and a MIG CAP flight had short voice contact with CROW 01 A.

I last saw him in the vicinity of 2101/10522. I did see him eject. I did see man-seat separation. I did see a good chute. I did hear a beeper. Weather in the area where member is down was over cast. Type of terrain is low hills and sparsley populated.

s/Gary R. Porter
t/GARY R. PORTER, Captain, USAF, 172-38-3925FR
17 WWS 29 Sep 72

"A CERTIFIED TRUE COPY"

HH Hayslett
H. H. HAYSLETT JR., Captain, USAF
225-46-3036FV, 388 Cmbt Spt Gp
APO San Francisco 96288 30 September 1972

PLAINTIFF'S EXHIBIT
15
77 C 1993

REPRODUCED (13 Dec 73) BY (DPMSCB)
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Classified by Director of Operations
SUBJECT TO GENERAL DECLASSIFICATION
SCHEDULE OF EXECUTIVE ORDER 11652
AUTOMATICALLY DOWNGRADED AT TWO
YEAR INTERVALS
DECLASSIFIED ON DECEMBER 31, 1980

UNCLASSIFIED

[redacted]

REPRODUCED (17 Oct 72) BY (DPMSC)
REPRODUCED COPY ___ OF 1 COPIES

PLAINTIFFS' EXHIBIT 16 - CASUALTY DOCUMENTATION RECORD OF CAPTAIN MICHAEL J. BOSILJEVAC

CASUALTY DOC ITATION RECORD

SUBJECT: BOSILJEVAC, Michael J.,, Captain (MIA 29 Sep 72)

TIME:

CALLER:

RELATIONSHIP:

DISCUSSION

9 Jan 1973

Mrs. Bosiljevac called to advise of the name of the individual who had information pertaining to her husband's downing was Captain Steven S. Peacock, 462-56-3207, 66 Fighter Weapons Squadron, Nellis AFB, Nevada. Per Col Gratch's request, 1400 hours, 9 Jan, undersigned contacted Capt Peacock. We compared stories of Captain Bosiljevac's downing and agreed up to the point where the SAR was terminated. He stated that in intelligence briefings, both he and other crewmembers had been told that the SAR had been terminated because "Snoopy" sources had advised that both men had been picked up within 45 minutes of landing and were now prisoners. He ✓ stated that the briefing officer was Lt Larry Kitchen and that he could add no further on the above. He additionally stated that [illegible]uld talk to other men in the squadron to see if they could recall any additional. Capt Peacock also stated that there was a civilian who works somewhere in the government with a high rating who had knowledge of it. He had talked to this man in Bangkok. He could not provide his name but stated that a Mr. Banks who worked for PACAF knew him.

1530 hours

Undersigned contacted Col Westbrook, Intelligence. Requested his assistance. He stated that a check of his files revealed nothing and that the words "Snoopy" sources meant nothing. However, he would check with the appropriate agency and advise me if there had been any information concerning subject officer.

11 Jan 73/1000

Col Westbrook called to state that there was no information that he could locate about Capt Bosiljevac. He stated that no one could identify the words "snoopy" source and further went on to state that he doubted that there was any truth to the report. I advised him that this office would now go to Intelligence at Korat to request their assistance. He agreed that this was about the only recourse left. Col Westbrook did state that there was intelligence data about Col O'Neil. Col O'Neil was Bosiljevac's frontseater. Col Westbrook stated that the information was still not from any source that we normally do not utilize.

11 Jan 73: Reference SMR message sent to Korat, Thailand.

J W Weinig

J. W. WEINIG, Captain, USAF
Directorate of Personnel Services

Cy to: AF/DPEC

ACTION: Capt Weinig: Upon receipt of answer, follow-up on information contained therein.

Autovon
For Peacock 682 ~~[illegible]~~ -4815

TYPE OR PRINT NAME, TITLE, GRADE OF RECORDER

SIGNATURE

PLAINTIFF'S
EXHIBIT
16
77 C 1993

AFMPC FORM 124 AUG 67

PLAINTIFFS' EXHIBIT 17 - TRANSCRIPT OF DEBRIEFING OF
LTC JAMES W. O'NEIL

[redacted] NOFORN

UNCLASSIFIED

DIAID NR 0031-1 (TAPE NR 1)

RETURNEE; ONEIL JAMES W. LTC

This sanitized version
prepared IAW 7602 AIG/
INMB ltr 29 Jun 76 filed
4L-2, 76.

DATE; 3 APRIL 73

LOCATION; MARCH AFB REGIONAL HOSPITAL RIVERSIDE CALIFORNIA

D WHAT I WANT TO START ON TODAY JIM IS CLARIFICATION OF THIS INFO THE I READ THE REPORTS THAT WER.. SENT ON MIKE HOW DO YOU PRONOUNCE HIS LAST NAME?

BOSILJEVAC.

BOSILJEVAC, AND THERE ARE SOME QUESTIONS I HAVE ON THERE. I STILL THINK YOU HAVE PROBABLY GOT SOME TOO. TRY AND GO OVER THIS AND SEE WHAT I CAN COME UP WITH.

OK.

I THINK THE BEST PLACE TO START IS FROM WHERE I READ IN THE REPORTS AFTER A GUNSHOT WOUND AND YOU SAW MIKE IN THE CHUTE?

YES.

NOW DID YOU SEE IF HIS LIFE VEST WAS INFLATED?

YES.

WHAT ABOUT THE REST OF HIS EQUIPMENT DID HE DROP HIS SURVIVAL GEAR

YEH HIS SIURVIVAL KIT WAS DEPLOYED MINE WAS TOO SO THATS NOT TOO MEANINGFULL IT HAPPENS AUTOMATICALLY AND HIS MAY HAVE TOO BUT HE HAD MADE THE INFLIGHT MODIFICATION OF THEPARACHUTE IN HIS LIFE VEST.

THEN YOU SAW A MOVE ON HIS PART?

NO I DIDNT ACTUALLY SEE A MOVE ON HIS PART.

UNCLASSIFIED

PLAINTIFF'S
EXHIBIT
17
77 C 1993

[redacted]

UNCLASSIFIED

R THE ONLY TIME I GOT A GOOD ENOUGH LOOKAT HIM TO SEE HE MAY HAVE BEEN MOVING OR ANYTHING AH HE WAS YOU KNOW RELAXED IN THE HARNESS AND HE WAS LOOKING DOWN WHICH BOTHERD ME AT FIRST BUT HE COULD HAVE BEEN LOOKING AT THE GROUND TO SEE WHERE HE WAS GOING TO GO. AND IN A PARACHUTE HARNESS THATS A PRETTY RELAXED POSITION HIS HEAD WAS FORWARD AND WHEN I SAW THAT IT KIND OF BOTHERED ME BUT THEN THE FACT THAT HE HAD ALREADY COMPLETED SOME ACTIONS INDICATED TO ME THAT HE WAS ALRIGHT.

D WHAT ACTIONS WHERE THEY THAT HE COMPLETED?

R WELL THE MODIFICATION OF THE PARCHUTE. IT REQUIRES REACHING UP BEHIND YOUR HEAD AND PULLING A COUPLE OF LANYARDS ONE ON EACH SIDE.

D POSSIBLE HE MIGHT HAVE BEEN JUST LOOKING DOWN TO THE GROUND?

R I THINK THATS WHAT HE WAS DOINGL. PARCHUTES HAD JUST CAME DOWN THRU A CLOUD LAYER WHERE WE COULD SEE THE GROUND AND AH THAT WOULD BE THE PRIMARY CONCERN AT THAT POINT IS AH WHAT WAS COMING UP.

D ~~WHAT~~ was THERE ANY A/C FIRE OR SMALL ARMS FIRE?

R NO.

D ABOUT HOW FAR WAS HE FROM YOU?

R OH AH WELL BETWEEN A QTR TO A HALF A MILE.

D DID YOU EVER SEE HIM HIT THE GROUND?

R NO.

D WAS HE ABOVE OR BELOW YOU?

R HE WAS BELOW ME.

UNCLASSIFIED

DIAI : Q031-1-2

[redacted]

R AND AH MY CHUTE WAS ROTATING SO I ONLY GOT TO SEE HIM WHEN I WAS FACING THAT DIRECTION. AND AH OF COURSE I DIDNT SEE HIM FOR A WHILE HE WAS BELOW THE CLOUDS AND I WAS ABOVE THEM SO I HAD LOST TRACK OF HIM FOR A WHILE AND THEN AFTER WE CAME OUT FROM BENEATH THE CLOUDS I GOT THAT ONE AH GOOD LOOK AT HIM AND AT THAT POINT AND SAW THE THINGS THAT HE HAD DONE AND AH THEN I SAW HIM ALTHOUGH HE WASNT MOVING AT THE TIME THEN AGAIN HE PASSED OUT OF VIEW BEHIND ME AND HE AH THE NEXT TIME I SAW HIM HIS PARACHUTE WAS ON THE GROUND HIS CANOPY COLLASPED AND I COULD SEE HIS AH LIFE PRESERVER AND THE LIFE RAFT, AND THAT IS ABOUT ALL I SAW AT THAT TIME I COULD SEE THEY WERE ALL LAID OUT ON THE GROUND AND AH WHETHER HE WAS ACTUALLY THERE OR NOT I COULDNT TELL BECAUSE IT WAS THE GREASS WAS ALMOST THE SAME COLOR OF THE FLYING SUIT I JUST GOT A GLIMPSE AS I ROTATED.

D YEH YOU SAID HE INFLATED HIS LIFE RAFT IN THE AIR?

R YES.

D IS THAT SOMETHING YOU HAVE TO DO MANUALLY TOO?

R YES.

D THEY GOT SO MUCH NEW FANGLED EQUIPMENT NOWADAYS. HE

R HE MIGHT HAVE STILL BEEN THERE. BUT AH I DIDNT SEE HIM AND I THOUGHT AT THAT TIME HE HAD ALREADY LEFT THAT IMMEDIATE AREA. BUT I CANT BE SURE OF THAT.

D WAS THERE ANY WIND?

R NO IT WAS VERY LIGHT.

D THE CANOPY WASBT MOVING AT ALL ON THE GROUND?

R NO.

D HOW FAR AHEAD OF YOU DO YOU THINK HE WAS?

R OH AHPROBABLY AH A 1000FT.

D GIVE YOU A GOOD QUESTION; ANY IDEA HOW MUCH THAT WOULD BE IN
TIME?

R AH NO. IM SURE SOMEBODY CAN TELL YOU HOW FAST A PARACHUTE CAN
DESCEND.

D CANT REMEMBER.

R I DIDNT GET MUCH OF A CHANCE TO SEE ANYMORE AFTER THE CLOUDS
BECAUSE THE TREESS YOU KNOW THE NEXT TIME I CAMEAROUND I WAS
LOW ENOUGHT HAT THE TOPS OF THE TRESS OBSCURED THE AREA WHERE HE
LANDED. I WAS CONCERNED ABOUT MYOWN LANDING SO.

D WHAT TYPE AREAWAS IT YOU LANDDED IN?

R OH IT WAS SMALL TRESS AND NOT VERY DENSE. AH WITH AH AND IT WAS
HILLY COUNTRY. BUT THERE WAS AH NOT MUCH UNDERBRUSH OR
ANYTHING LIKE THAT. I MY FIRST THOUGHT AFTERI HAD LANDED WAS
THAT I WOULD GO TO HIM BUT THE AHBETWEEN US THERE WAS A VERY
STEEP RAVINE AND AT THE BOTTOM I COULD SEE A PATH ANDI DECIDED
IT WAS MORE INVOLVED TO DO IT.

D HOW LONG WERE YOU ON THE GROUND BEFORE YOU WERE CAPTURED?

R WELL IT S KINF OF DIFFICULT TO SAY I WOULD SAY AH AT LEAST
30 MINUTES IF NOT MORE. NOT MORE THAN AN HR.

D OK NOT MORE THAN AN HR. DID YOU HEAR ANYTHING DURING THAT TIME?

R THE AH ONLY THING I HAERD WAS AH WAS ABOUT 5 ROUNDS OF AH WHAT
SOUNDED LIKE AUTOMATIC RIFLE. AND AH I DID HEAR AH A/C
IN THE AREA. I DIDNT SEE ANY AH A/C THEY APPARENTLY STAYED ABOVE
THE CLOUDS.

[redacted] NOFORN

UNCLASSIFIED

R I THOUGHT AT THE TIME THAT THE RIFLE FIRE MAY HAVE BEEN AGAINST ONE OF THE A/C.

D WHAT DIRECTION ?

R WELL IT COULD HAVE BEEN I COULDNT REALLY TELL BY THE SHAPE OF THE TERRAIN THERE ALL SOUNDS JUST CAME FROM ONE DIRECTION

D THEN THE NEXT TIME THAT THIS CAME UP WAS WHEN YOU WERE IN PRISON AND YOU ASKED A GUARD ABOUT HIM?

R YES. I HAD BEEN THERE IM NOT SURE IT WAS 4 OR 5 DAYS BUT I FELT CERTAIN BY THAT TIME HE WOULD HAVE BEEN CAPTURED OR RESCUED SO I WASNT JEAPORDIZING ANYTHING AND AH I AHASKED THEGUARD ABOUT HIM AND AH HE SAID WHATS HIS NAME AND I TOLD HIM AND HE SAID I WILL CHECK. AND THEN HE WAS GONE ABOUT 5 OR 10 MINUTES AND HE CAM BACK AND SAID HE IS HERE HE IS LUCKIER HAN YOU HE IS UNINJURED. AND ISAID CAN I SEE HIM AND HE AH. WELL THAT MEESAGE BEFORE OF EVALUTAION OF THAT STATEMENT AND ITS PRETTY HARD TO EVALUATE I AH IN VIEW OF WHAT IVE LEARNED SINCE I KNOW THAT THEY AH V WHETHER BESTAEMENT IS TRUE OR NOT HAS NO BEARING ON WHAT THEY SAID OR NOT. AND IF THEY HAD ANYOBJECTIVE IN WHETHER TRYING TO MAKE ME FEEL BETTER OR WORSE OR WHATEVER BUT AT THE TIME I BELIEVE TI WASNT ANY AH HE WASNT LAUGHING OR SMILING LIKE YOU KNOW IF HE HAD BEEN SLY AND IT SEEMEDLIKE A PRETTY STARIGHT FORWARD ANSWER.

D DID THE GUARD SPEAK GOOD ENLGISH?

R AH YES.

D SO HE WOULD HAVE HAD THE NAMERIGHT?

R YES I BELIEVE SO.

UNCLASSIFIED

([redacted] NOFORN

UNCLASSIFIED

D DO YOU KNOW EGUARDS NAME?

R NO I DONT I WAS NEVE AH I SAW HIM AH LIKE A FEW TIMES WHEN I WAS IN SOLO AND AH BIT I WA, NEVER ABLE TO AHAFTER I GOT TO THE KARRERGROUP AND WE HAD NAMES I DIDNT SEE HIM AGAIN SO I DONT KNOW. WHATHIS NAME S, THE THREE OF US LATER AND WE SAW HIM THEN N ENAMED AOURSELVES WE CALLEDHIM . WE NAMED HIM WYNN ? BUT AH ONLY THETHREE OF US ASSOCIATED THAT NAME WITH HIM.

D LATER ON I WANT TO GO OVER SOME OF THE ~~XX~~ ENEMY PERSONELL

R IS THERE ANYPORTION OF THIS AS LIFE SUPPORT? OREINTATION DEBREIFNG?

D YEH OH YEH.

R IS THAT NOW OR LATER ON.

D LATER ON WELL GET TO IT. OH ONE OTHERTHING YOU QUERIED THRU THE CAMP?

R YES.

D IF MIKE WASAROUND OR IF ANYBODY HADSEEN HIM?

R YES. AND AH I GOT A NEGATIVE REPORT ON THAT.

D OK YOU SAID YOU WERE IN SOLO HOW LONG?

R AH TWO MONTHS.

D TWO MONTHS, HOW SOON DOD YOU GO INTO SOLO?

R WELL AH THE FIRST DA Y WHENI GOT THEREI WAS IN SOLO AND I STAYED THAT WAY UNTIL AH I THINK IT WAS THE 3RD IOF DEC.

D WELL COULD YOU MAKE ANY CONTACT S DUTRING THAT TIME?

R AH NO I DIDNT HAVE ANY CONTACT I DID SEE AH A COUPLE OF OTHER PRISONERS.

PLAINTIFFS' EXHIBIT 18 - MESSAGE FORM DATED 1 OCT 72

IMMEDIATE

1 OCT 72 17 26

NOTIFIED CASUALTY / GCCR / 1236L 1 OCT 72 / GH

IMMEDIATE

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*  UNCLASSIFIED  E F T O  *
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ACTION DPMSC		
CC	DA	DC
LG	LGM	LGS
DP	SG	IP
SE	DO	AB
AC	PM	SN
SS	SP	DE
DPM	DPMSC	RTD 13

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PT 00100
OTTEZYUW RUMOKKA5605 2751633-EEEE--RUWTFJA.
ZNY EEEEE
O 011626Z OCT 72 ZFF-1
FM 388CSG KORAT RTAFB THAILAND
TO RUEFHQA/CSAF/LGSKC
RUWTFJA/AFMPC/RANDOLPH AFB TX/DPMSC
INFO RUHHABA/CINCPACAF/HICKAM AFB HI/DPSP
RUMOSRA/7/13AF/UDORN RTAFB THAILAND/DC
RUHHRKA/13AF/CLARK AF PI/DPSP
RHMSMVA/COMUSMACV/SAIGON RVN/JPRC
RHMSMVA/USA MORTUARY/SAIGON RVN/JCGRO
BT
UNCLAS E F T O FOR OFFICIAL USE ONLY/DPMS
CASUALTY REPORT, CONTINUED MISSION IN ACTION REPORT, BATTLE
A.  BOSILJEVAC REPEAT BOSILJEVAC, MICHAEL JOSEPH
B.  CAPTAIN
C.  505-56-0057FR REPEAT 505-56-0057FR, REGULAR AIR FORCE,
FORMER AFSN FR3195450, REPEAT FR3195450
G.  CAPTAIN MICHAEL JOSEPH BOSILJEVAC WAS THE EWO OF AN F-105G
THAT DEPARTED KORAT RTAFB, THAILAND AT 1206 HOURS LOCAL ON A
COMBAT MISSION OVER SEA.  AT APPROX 1325 HOURS LOCAL (CHANGED FROM
1345 HOURS LOCAL BASED ON INFORMATION RECEIVED SUBSEQUENT TO

PAGE 2 RUMOKKA5605 UNCLAS E F T O FOUO
INITIAL REPORT) THE AIRCRAFT WAS HIT BY SAM.  LIEUTENANT COLONEL
JAMES WILLIAM O'NEIL, 566-32-1515FR, WAS THE PILOT AND IS ALSO
MISSING IN ACTION.  CIRCUMSTANCES AND FACTORS HAVE BEEN ANALYZED
AND EVALUATED PURSUANT TO PARA 2-10B, AFM 30-4 AND DO NOT WARRANT
A CHANGE IN STATUS OF THIS MEMBER.  THE POSSIBILITY OF SURVIVAL OF
CAPTAIN BOSILJEVAC IS GOOD.  ALTHOUGH NO VOICE CONTACT WAS MADE
WITH CAPTAIN BOSILJEVAC THE POSSIBLIITY EXISTS THAT HE LANDED
SAFELY IN A SECURE AREA AND IS PRESENTLY EVADING CAPTURE.  AF
FORM 484 WILL BE SUBMITTED ON 6 OCT 1972.
BT
#5605

NNNN
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1 OCT 14 26

FOR OFFICIAL USE ONLY

IMMEDIATE

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*  UNCLASSIFIED  E F T O  *
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PLAINTIFF'S EXHIBIT 18 EL

77 C1793

PLAINTIFFS' EXHIBIT 19 - MESSAGE FORM

BEST COPY AVAILABLE

30 Mar 73 0516

SPECIAL HANDLING REQUIRED, NOT RELEASABLE TO FOREIGN NATIONALS

UNCLASSIFIED

DPMSC (U)

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IMMEDIATE S [redacted]

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PT 00140
OTTSZYUW RHMIAAA3873 0891006 [redacted] RUWTFJA.

MAR 30 U 5 1 0 73

ZNY [redacted]
0 300901Z MAR 73
FM 13AF CLARK AB PHIL/JHPC
TO AIG 7312
INFO RUMOREA/NKP THAI/JCRC REP
BT
[redacted] NO FOREIGN DISSEM LIMDIS JOPREP JIFFY JOCRC
THIS IS A HOMECOMING (FORMERLY EGRESS RECAP) AIR FORCE
MESSAGE. RELEASABLE BY SERVICE CASUALTY DIVISIONS ONLY.
'SPECIAL ATTENTION PRIMARY HOMECOMING ACTION OFFICER.'
REFERENCE: SICR D-7CX-24000 DEBRIEFING REPORT NO. 298
1. RETURNEE: JAMES W. O'NEIL RANK: LT COL
DEBRIEFER: HARVEY T. JOCOLICK RANK: COL
CATEGORY 1: PERSONNEL KNOWN BY NAME AND BELIEVED TO
BE ALIVE.
NAME: MICHAEL J. BOSKJEVAC
NICKNAME(S): MIKE
RANK: CAPT BRANCH OF SERVICE: USAF
CREW/DUTY POSITION: EWO AIRCRAFT/VEHICLE: F105G
DUTY STATION: KORAT AB
DATE OF LAST INFO: 3 OCT 72 DATE QUALIFIER: EXACT

4

73-0745

PAGE 2 RHMIAAA3873 [redacted] NOFORN LIMDIS
SOURCE OF INFO: NVN GUARD
LAST KNOWN STATUS: ALIVE AND WELL IN CAMP
NICKNAME(S): HILTON
COUNTRY: NVN
PHYSICAL CONDITION: GOOD
COMMENTS: AFTER EJECTION HIS CHUTE WAS
OBSERVED, INFLIGHT MOD WAS COMPLETE, LIFE VEST
WAS INFLATED AND LANDING IN OPEN AREA WAS
OBSERVED. NOTHING FURTHER UTIL IN CAMP
-HILTON- WHERE NVN GUARD TOLD COL O'NEIL
THAT IS CREW MAN WAS THERE AND ININJURED.
GDS-81
BT
#3873

NNNN

Classification canceled ([redacted]
by authority of AF/DPEC Ltr, 10 NOV 75
by H. A. Rowlett, DAFC, DPMCB, 14 Nov 75

****

IMMEDIATE [redacted]

****

[redacted]

UNCLASSIFIED

PLAINTIFF'S EXHIBIT
19 EL
92C 1993

PLAINTIFFS' EXHIBIT 21 - LETTER FROM LOUIS E. FOSTER TO MRS. MARY K. BOSILJEVAC DATED 7 SEP 1977

DEPARTMENT OF DEFENSE
UNITED STATES OF AMERICA

DEFENSE INTELLIGENCE AGENCY
WASHINGTON, D.C. 20301

7 SEP 1977

U-5,290/RDS-3A

Mrs. Mary K. Bosiljevac
8317 South 49th Street
Omaha, NE 68157

Dear Mrs. Bosiljevac:

Your letter of August 21, 1977 requesting under the Privacy Act of 1974, 5 U.S.C. 552a, records pertaining to your husband, Captain Michael J. Bosiljevac, USAF, was received in this office August 24, 1977.

We are pleased to inform you that a number of reports relevant to your request have been located by the Defense Intelligence Agency. However, an unavoidable delay has been encountered in providing you copies of those records. Further coordination is required by those elements contributing to or originating these records. To fully service your request we have initiated action necessary to expedite the review and return of the subject reports.

We trust you understand the necessity for this requirement. You will be notified immediately upon completion of the review and provided a full accountability for all records located.

Sincerely,

Louis E. Foster
LOUIS E. FOSTER
Freedom of Information Act
Officer

PLAINTIFF'S
EXHIBIT
21
79 C 1293

PLAINTIFFS' EXHIBIT 22 - DOCUMENT DATED FEBRUARY 4, 1970
ENTITLED "SUBJECT: 2 JAN 70 RESCUE ATTEMPT OF MILESTONE 507

PLAINTIFF'S EXHIBIT
22
77 C 1793

February 4, 1970

SUBJECT: 2 Jan. 70 Rescue Attempt of Milestone 507

The following narrative contains certain portions of the mission that may be pertinent to identifying and establishing the present status of the Navy crewmembers involved.

......Arriving the area at approximately 1730, I was briefed that one chute had been sighted but that no voice contact had been established and a radio beeper/chute beeper was blocking guard channel. It was decided to make an attempt shortly thereafter because of rapidly approaching darkness .....I penetrated the area of the parachute after it was determined from the air that the crewmember was unable to help himself.

I found the man lying on his back and still attached and somewhat entangled in his chute. My initial check as to the man's physical condition was hurried and brief, but it is my opinion that the man was deceased! It is also my opinion that the man was either unconscious or deceased upon contact with the ground because of his body position when I found him. One arm was pinned behind his back, his legs were crossed with one leg tucked under the opposite thigh in a very abnormal position, and there were no signs of self-help. His seat kit was still attached and his survival harness was not on his body.

Because of the known hostility of the area and the time factor involved, I immediately began to separate the man's risers from their cape-wells. During this time the rescue aircraft began taking ground fire and subsequently was forced to leave the area. Because guard channel had been overridden with the continuous tone, I had no radio contact to inform the pilot of the situation on the ground. I was yanked from the area before I could complete a successful hook-up.

Later...I was approached by Navy personnel with pictures of the crewmen of Milestone 507. I chose one set of the pictures that I believed to be the man I found. The situation had been one in which I found myself under great strain. Under the circumstances, I could never disregard the possibility of human error. However, in my own opinion, the pictures I chose have to be the same man I found on 2 Jan. 70. The other set of pictures were not familiar to me in any respect.

Richard G. [illegible]

PLAINTIFFS' EXHIBIT 23 - PAGES 134, 215 AND 217 OF BOOKLET

structed by a Chinese construction team, and I would assume the CIA monitored the construction of that road.

General WALTERS. Yes, sir.

Mr. MCCLOSKEY. There were Chinese in Laos?

General WALTERS. Yes, sir.

Mr. MCCLOSKEY. Was there any kind of indication, any report at all, that Americans were shot down in that area or might have been transported into that area?

General WALTERS. I believe—and I may be wrong—that the area where the Chinese were building the roads was near the Burmese border and well to the west of any area where fighting was taking place.

Mr. MCCLOSKEY. That's correct, but the scope of my question was a little broader.

Do we have any intelligence at all of any Americans being transported into that area?

Mr. MCCLOSKEY. No, sir, we do not. I believe that—I might add—I have just been told it was our practice to avoid flying over the road that the Chinese were building.

The CHAIRMAN. On page 24 of your larger statement, about six lines down on page 24, you say there were cases where men were known to have survived their incident. What does that mean?

Mr. MCCLOSKEY. I think the incident was the actual capture. I was somewhat puzzled, Mr. Chairman, myself. I think what they mean is the actual passage from freedom into captivity.

The phraseology struck me as curious also, sir, but I saw it after it had been sent to the committee. But I believe what is meant is the actual moment of passage into captivity.

Mr. MCCLOSKEY. Can you give me any rough number of intelligence reports—whether verified or note—as to having observed American POW's alive in Laos?[1]

General WALTERS. I can get it for you. I do not have it.

Mr. MCCLOSKEY. You don't have it on hand, but somewhere there is a summary of how many—reports from indigenous soldiers or captured——

General WALTERS. We'll get it for you, sir.

Mr. MCCLOSKEY. No further questions.

The CHAIRMAN. I think you have covered it very well.

Mr. MOAKLEY. Just one question.

In the Arizona Republic dated December 10, 1974, it claimed there was a supersecret CIA report that confirmed that there were American POW's held in Southeast Asia. Did you hear about that?

General WALTERS. Sir, it must be so supersecret that the Deputy Director of CIA has not seen it.

Mr. MOAKLEY. Is that possible?

General WALTERS. No, sir.

Mr. MOAKLEY. Thank you.

The CHAIRMAN. General Walters, thank you very much for appearing here today. I am sure there are some questions that we have overlooked. But you have been very dedicated and very sincere in your answers.

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[1] See p. 215.

Health was one hazard. I had several bouts of dysentery, as did the guerrillas sometimes. Mike and I had boils on our legs; mine were diagnosed after my release as symptoms of an Asian disease called melioidosis, a bloodstream disease with a mortality rate up to 50 percent. The food was not really adequate, considering the limited amount of rice we could force down, to maintain the weight of a good-sized Westerner. We were held mostly in grass-covered shacks by day and traveled every few nights, by truck or bicycle or on foot, through areas that were under frequent attack by U.S. and South Vietnamese tanks and planes. Several times we heard and felt the deep pounding of B-52 raids in the distance. Our captors said they had survived several B-52 attacks, escaping direct hit.

Communications and record-keeping appeared to be very primitive. We sometimes saw our captors writing tiny messages to be carried away in the night by a courier on a bicycle or motorbike. At one house where we stayed, we saw one of the guerrillas reach into a hole in a palm-leaf wall and take out a tiny handwritten note, apparently left there by another group of guerrillas. It occurred to me several times that I could have died of illness or injury in a way that no one would ever find my body or a record of my death.

Basis for hope that any individual missing person has survived is bound to fade with the passage of time. But some Americans have survived for years under far worse conditions than we experienced. No one can be certain without a precise accounting, and in some cases that accounting may never be possible.

SUMMARY OF SIX REPORTS SUBMITTED BY CIA

Part I.—Attached is a summary of six reports of Pathet Lao representatives making statements about American PWs.

Part II.—Attached is a summary of reporting on a statement made on 11 November 1969 by Soth Petrasy to the Pathet Lao, to the effect that "the Pathet Lao actually had a number of prisoners in addition to the 158 given"—that is, shown on a list furnished by the U.S. Government to the International Red Cross and by the IRC to Soth Petrasy. The news reports to Soth Petrasy's statements misconstrued his words to mean that the Pathet Lao was holding more than 158 US PWs.

Part III.—Attached are files on five incidents between February 1966 and January 1970, involving nine men who went down in the vicinity of the Ho Chi Minh trail in Southern and Central Laos. In each case there is reason to believe that the indigenous forces on the ground, either Pathet Lao or North Vietnamese, were aware of the crash and could easily have identified the individuals concerned. A map showing the location of the crash sites is also provided.

Part IV.—Attached is a summary of relatively recent information on Americans known to have been in captivity in Laos. This information was included in material presented to the Select Committee on 17 March 1976.

Part I.—*Summary of six reports of Pathet Lao representatives making statements about American PWs.*

(a) In September 1968, Soth Petrasy told a U.S. official that "pilots are generally kept near the area in which their plane is downed and therefore may be found throughout Laos from the south to the north."

(b) During an April 1971 interview with a Swedish correspondent, Prince Souphanouvong, Chairman of the Lao Patriotic Front Central Committee, was asked to comment on the Pathet Lao policy toward captured enemy soldiers and American pilots. In response, Prince Souphanouvong made the following statement:

"The LPF (Lao Patriotic Front) has made public a concrete policy toward enemy soldiers or agents captured or giving themselves up, including GIs. All the American pilots engaged in bombings or toxic chemical sprays on Lao territory are considered criminals and enemies of the Lao people. But once captured, they have been treated in accordance with the humane policy of the LPF. The question of enemy captives, including U.S. pilots, will be settled immediately after the U.S. stops its intervention and aggression in Laos first, and foremost, ends the bombing of Laos territory."

(c) In a conversation with U.S. personnel on 1 May 1971 Soth Petrasy was asked why the Pathet Lao had not released a list of prisoners as North Vietnam had. He replied that the situation in Laos was different from that in North

COPY OF UPI NEWS ITEM, LAOS, NOVEMBER 11, 1969

VIENTIANE, LAOS (UPI)—A Communist Pathet Lao official said today more th 158 American airmen are held prisoner in Laos. He repeated a threat they wi be tried as criminals.

Soth Petrasi, Head of the Pathet Lao Delegation in Vientiane, told newsmen new list had been made available Nov. 5 adding 33 names to the number of U.S pilots shot down on bombing missions over Communist controlled areas of Laos.

"The United States and Laos have never formally declared war and therefo there will be no prisoners," Soth said. "They will be tried by a Laotian Peopl Court as criminals."

The threat of trials has been made several times in the past by the Pathet La but there has never been any information on whether such trials are actual carried out.

For the first time, Soth said he would make efforts to forward letters and tel grams sent him by the relatives of U.S. airmen believed shot down in Laos. I the past, he has always rejected such requests.

The list that Soth displayed was one which originates from American sourc and is forwarded to him periodically by the International Red Cross.

As in the past, Soth made no comment on the names appearing on the li but said the Pathet Lao actually had a number of prisoners in addition to t 158 given.

U.S. Officials have never admitted to any American air activity over La other than reconnaissance flights. But allied sources have disclosed that U.S. a strikes, including support missions for ground forces, involve as many as 6 planes a day over Laos.

Soth said that the list included 51 Americans shot down last year and 41 sh down over Laos between January and June of this year. The U.S. Command lis at least 400 pilots as prisoners in North Vietnam.

In addition, Soth said, the Pathet Lao was holding a large number of milita personnel captured in Laos as well as about 30 South Vietnamese prisoners an some nationalist Chinese agents.

PART III.—LIST OF INCIDENTS

Date	Name	UTM coordinates	Geographical coordinants
Feb. 10, 1966	Hunter, R. P., Jr.	Captain, USAF	XD 413458, 106-19, 16-42.
	Nickel, E. P., Jr.	do	
Feb. 15, 1968	Mauterer, O.	Major, USAF	WE 761257, 105-43, 17-25.
May 20, 1968	Lane, G. O.	SFC, USA	YD 258029, 107-07, 16-18.
	Owen, R. D.	SSG, USA	
May 13, 1969	Scott, M. J.	SFC, USA	YC 7803, 107-36, 15-23
	Bessor, B. C.	1st lieutenant, USA	
Jan. 2, 1970	Fryer, B. C.	Lieutenant, USN	WE 689422, 105-38, 17-33.
	Brooks, N. G.	do	

Part IV.—Summary of relatively recent information on Americans known t have been alive in captivity in Laos.

Charles Dean, U.S. civilian, and Neil Sharman,[1] Australian civilian, were in reported alive at Ban Phontan, Khammouane Province, 23 February 1975. Th report was considered reliable. Either the Hanoi or Vientiane authorities mu have information on the fate of these two men.

Debriefing of Thai and Lao nationals released by the Pathet Lao in t prisoner exchange of September through November 1974 produced one sighti report which could not be related to U.S. personnel captured in Laos and lat released. Extracts from the report and the DIA evaluation are attached.

No information on missing persons has been received from the Governme of the People's Democratic Republic of Laos since it assumed power on : August 1976.

Part IV.—Attachment: Extracts from sighting report and from DI evaluation.

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[1] See pp. 282–288.

PLAINTIFFS' EXHIBIT 24 - LETTER FROM GEORGE L. BROOKS TO DIRECTOR OF FREEDOM OF INFORMATION REQUESTS DATED MARCH 9, 1977

George L. Brooks
16 Cresthaven Drive
Newburgh, New York 12550

PLAINTIFF'S
EXHIBIT
24
77 C 1793

March 9, 1977

Central Intelligence Agency
McLean, Virginia

TO: DIRECTOR OF FREEDOM OF INFORMATION REQUESTS

Dear Sir,

I request that I be supplied with the following copies of information in the CIA files relative to American prisoners of war and missing in action in the country of Laos.

> ITEM #1: As recorded in "Hearings Before The House Select Committee On Missing Persons in Southeast Asia," Book 3, Page 215; Under title of Summary of six reports submitted by CIA and also on Page 217 under Part III, List of Incidents - specific reference is made of - Brooks, N. G. Lieutenant, USN. I request all material as it relates to Lieutenant Brooks - my son.
>
> ITEM #2: In the same book of hearings referred to in Item #1 - (Page 122) in testimony given by Lieut. General Vernon A. Walters, former Deputy Director of the CIA. I request all information in regard to prisoners of war as referred to under the Heading "Laos."

I have a need to know and certainly a right to know all information on hand, whether confirmed or unconfirmed.

General Walters testified (Page 132), "It would be inhuman to do such a thing (withholding of information) to the families and I am sure that we would stretch every desire to protect sources and methods if we had any information we could give these families."

Presidents Ford and Carter have stated on several occasions that the families have been made fully aware of all information and yet I was unaware of a "CIA file" on my son until I read the Select Committee Report.

Two persons who have seen the report confirm that it contains material which his mother and I should be made aware of.

I anxiously await your reply.

Sincerely,

George L. Brooks
George L. Brooks

PLAINTIFFS' EXHIBIT 25 - LETTER FROM PETER P. UZON TO GEORGE L. BROOKS DATED 24 AUG 1977

BUREAU OF NAVAL PERSONNEL

DEPARTMENT OF THE NAVY
NAVY FAMILY ALLOWANCE ACTIVITY
ANTHONY J. CELEBREZZE FEDERAL BUILDING
CLEVELAND, OHIO 44199

IN REPLY REFER TO

NFAA:MS:pm
BROOKS, Nicholas G
066-34-9599
24 Aug 1977

Mr. George L. Brooks
16 Cresthaven Drive
Newburgh, New York 12550

Dear Mr. Brooks:

Lieutenant Cameron, Pers OG, called to inform me of your desire for a statement of account for your son, Lieutenant Commander Nicholas G. Brooks.

Lieutenant Cameron was advised of the balance in your son's savings deposit account for the quarter ending 30 June 1977. Persumably you are in receipt of the information that the balance on deposit on 30 June was $182,960.22. Of this amount, $53,508.90 represents interest and the remaining $129,451.32 is the principal.

The enclosed copy of Lieutenant Commander Brooks' Personal Pay Data statement reflects his current monthly pay entitlements and deductions. If there is any item which is not clear to you, please do not hesitate to allow me to clarify it for you.

Sincerely yours,

Peter P. Uzon
PETER P. UZON
Director

Encl:
(1) Personal Pay Data
statement

PLAINTIFF'S EXHIBIT
25
77C1793
PENGAD-Bayonne, N.J.

A-792

PERSONAL PAY DATA
4ND FAA 7220/1 (5-69)

DATE STATEMENT PREPARED 24 Aug 1977				
MEMBER'S NAME BROOKS, Nicholas G.	RANK/RATE LCDR	FILE/SERVICE NO.	SOCIAL SECURITY NO. 066-34-9599	
DATE OF LAST PAY CHANGE 10/1/76	TYPE OF CHANGE Pay raise	DATE AMT. BROUGHT FWD.	AMT. BROUGHT FWD.	

PAY AND ALLOWANCES

DESCRIPTION OF PAY ENTITLEMENTS	EFFECTIVE DATES FROM	EFFECTIVE DATES TO	MONTHLY RATE	AMOUNT
BASE PAY (10 YEARS)	10/1/76		1,447.80	$
QUARTERS (BAQ)	10/1/76		222.90	$
SUBSISTENCE (BAS)	10/1/76		55.61	$
AVIATION PAY (ACIP)			245.00	$
HOSTILE FIRE PAY			65.00	$
				$
				$
				$
				$
				$
				$
				$
				$
TOTAL PAY AND ALLOWANCES				$ 2036.31

DEDUCTIONS

TYPE OF ALLOTMENT AND PAYEE	PERIOD	MONTHLY RATE	AMOUNT
M - Navy Mutual Aid		10.47	$
J - Savings deposit		1,937.74	$
			$
			$
			$
WITHHOLDING TAX			$
FEDERAL INSURANCE CONTRIBUTIONS (FICA) TAX		84.70	$
SERVICEMEN'S GROUP LIFE INSURANCE (SGLI)		3.40	$
TOTAL DEDUCTIONS			$ 2,036.31
UNALLOTTED BALANCE			$

PLAINTIFFS' EXHIBIT 26 - SCRIPT FROM DEPARTMENT OF DEFENSE BRIEFING OF MEMBERS OF WOODOCK COMMISSION

PLAINTIFF'S EXHIBIT
26
77C1793

MR. CHAIRMAN, MEMBERS OF THE COMMISSION.

WE IN THE DEPARTMENT OF DEFENSE ARE PLEASED TO ASSIST YOU AS YOU ENDEAVOR TO INITIATE THIS ACCOUNTING FOR OUR MISSING MEN IN SOUTHEAST ASIA. THE FAMILIES OF THE MISSING HAVE SUFFERED THE PAIN OF UNCERTAINTY ABOUT OUR LOST MEN FOR MUCH TOO LONG, AND NEEDLESSLY SO IN MANY CASES. SOME OF THAT DOUBT COULD HAVE BEEN ALLEVIATED LONG AGO IF THE INDOCHINESE GOVERNMENTS HAD COOPERATED WITH US AT THAT TIME. WE KNOW THEY HAVE INFORMATION ABOUT SOME OF OUR MISSING PEOPLE BUT, FOR REASONS OF THEIR OWN, HAVE WITHHELD IT FROM US. WE HOPE YOUR EFFORTS WILL ULTIMATELY RESULT IN INCREASED COOPERATION BETWEEN OUR NATIONS SO WE MIGHT BE ABLE TO FINALLY CLOSE THE BOOKS ON THE VIETNAM WAR.

TODAY, I WOULD LIKE TO TELL YOU ABOUT SOME OF THESE MISSING MEN AND HOW WE KNOW THE COMMUNISTS CAN ACCOUNT FOR THEM. CONVERSELY, WE MUST NOT BE SO NAIVE AS TO THINK THEY KNOW ABOUT ALL OF THEM, SO ANY ACCOUNTING WE MAY GET WILL BE LESS THAN A FULL ONE.

THE VIETNAM CEASE-FIRE AGREEMENT CONTAINED THE MOST COMPREHENSIVE PROVISIONS TO ACCOUNT FOR THE MISSING EVER FOUND IN ANY CEASEFIRE DOCUMENT. HAD THESE PROVISIONS BEEN IMPLEMENTED, WE WOULD HAVE HAD OUR ACCOUNTING; HOWEVER, THE VIETNAMESE COMMUNISTS CONSISTENTLY BLOCKED THE RESOLUTION OF THIS MATTER. THIS IS NOT THE TIME FOR RECRIMINATIONS. THE WAR IS NOW OVER SO THERE IS NO VALID REASON FOR THE COMMUNISTS TO CONTINUE WITHHOLDING INFORMATION ABOUT OUR PEOPLE. IT SHOULD ALSO BE NOTED THAT MOST OF THEIR EARLIER OBJECTIONS TO IMPLEMENTATION OF THE ACCOUNTING BECAME MOOT WHEN THE SOUTH VIETNAMESE GOVERNMENT COLLAPSED.

DURING OPERATION HOMECOMING IN 1973, WE REPATRIATED ALMOST 600 AMERICANS WHO HAD BEEN PRISONERS OF WAR, BUT MORE THAN 2,500 OTHER AMERICANS DID NOT RETURN. THERE ARE STILL 2,546 AMERICANS, INCLUDING 41 CIVILIANS, LISTED AS DEAD WITH BODIES NOT RECOVERED OR AS MISSING OR PRISONER. ALTHOUGH 758 MILITARY PERSONNEL ARE ON THE BOOKS AS "PRISONERS OF WAR" OR "MISSING", THE DISTINCTION BETWEEN THE TERMS IS PROBABLY ACADEMIC. WE HAVE NO EVIDENCE TO INDICATE THAT ANY AMERICAN SERVICEMEN ARE BEING HELD AS PRISONERS IN SOUTHEAST ASIA, BUT WHETHER A MAN IS ALIVE OR DEAD DOES NOT RELIEVE US OF THE RESPONSIBILITY TO SEEK AN ACCOUNTING FOR HIM. WE WANT THE FULLEST POSSIBLE ACCOUNTING FOR THE ENTIRE 2,546 AND, WHEREIN POSSIBLE, WE WANT THE REMAINS OF OUR DEAD RETURNED. WE CANNOT ATTAIN THIS GOAL WITHOUT COMPLETE COOPERATION BY THE VIETNAMESE.

IT HAS BEEN SUGGESTED THAT THE COMMUNISTS MAY BE RELUCTANT TO GIVE US INCOMPLETE REMAINS OR SKETCHY INFORMATION. SINCE THE CEASE-FIRE, THE VIETNAMESE HAVE RETURNED SOME BODIES TO US AND, IN EACH CASE, THEY HAVE BEEN EASILY IDENTIFIABLE. CONSEQUENTLY, THEY MAY THINK WE WOULD BE SUSPECT OF ANYTHING LESS, BUT THIS IS NOT TRUE. THEY SHOULD UNDERSTAND THAT WE DO NOT EXPECT THEM TO HAVE KNOWLEDGE OF EVERY ONE OF OUR MISSING, BUT WE DO WANT TO KNOW WHAT THEY DO HAVE. THE SMALLEST BIT OF NEW DATA MAY, IN SOME CASES, BE THE MISSING LINK TO DETERMINE THE FATE OF A MISSING MAN.

THERE IS A GREAT DEAL OF INFORMATION WE CAN RESONABLY EXPECT, BUT THERE ARE SOME INHERENT DANGERS IN THE EXCHANGE OF THESE DATA. WE HAVE ESTABLISHED CATEGORIES TO DETERMINE WHICH MEN THE COMMUNISTS SHOULD KNOW ABOUT, BUT CATEGORIZING IS, AT BEST, AN INEXACT SCIENCE. AFTER THE CEASE-FIRE, THE VIETNAMESE GAVE US INFORMATION ABOUT SOME MEN WE DID NOT EXPECT THEM TO KNOW ABOUT. ON THE OTHER HAND, THEY DENIED KNOWLEDGE OF

SOME AMERICANS WHO WERE KNOWN TO HAVE BEEN IN THEIR CUSTODY, SOME OF WHOM HAD EVEN BEEN EXPLOITED BY THE ENEMY FOR PROPAGANDA PURPOSES. SINCE OUR CATEGORIES WERE DEVISED USING THE LIMITED DATA AVAILABLE TO US, IT WAS NOT IN OUR BEST INTEREST TO TELL THE OTHER SIDE ALL WE THOUGHT THEY SHOULD KNOW. IN THE PAST, WE HAVE PREFERRED TO GIVE THEM ONLY REPRESENTATIVE INFORMATION. THIS ALLOWED US A BETTER METHOD OF CHECKING DATA THEY MIGHT FURNISH AND IT DID NOT OVERWHELM THEIR SYSTEM FOR INFORMATION GATHERING. THIS PARTICULAR TECHNIQUE MAY OR MAY NOT BE THE MOST ADVANTAGEOUS ONE AT THIS LATE DATE.

(SLIDE 1 - ON) OUR FIVE CATEGORIES AND THE CRITERIA FOR PLACING AN INDIVIDUAL IN A CERTAIN GROUP ARE INDICATED HERE.

YOU WILL NOTE THE CATEGORIES RANGE FROM ONE OF CONFIRMED KNOWLEDGE BY THE ENEMY TO ONE IN WHICH THE ENEMY HAS NO KNOWLEDGE.

I REEMPHASIZE THIS IS A TOOL WE HAVE USED TO DETERMINE WHAT TO EXPECT FROM THE OTHER SIDE. I WILL DISCUSS EACH OF THE CATEGORIES AND TELL YOU OF MISSING MEN IN THAT CLASSIFICATION.

(SLIDE 1 - OFF)

(SLIDE 1a - ON)

THE FIRST IS CONFIRMED KNOWLEDGE AND MOST OF THE MEN IN CATEGORY 1 WERE PLACED THERE AS A RESULT OF INTELLIGENCE INFORMATION.

CATEGORY 1 - CONFIRMED KNOWLEDGE

THIS CATEGORY INCLUDES ALL PERSONNEL WHO WERE:

A. IDENTIFIED BY THE ENEMY BY NAME

B. IDENTIFIED BY RELIABLE INFORMATION RECEIVED FROM RELEASEES/ ESCAPEES, OR

C. REPORTED BY HIGHLY RELIABLE INTELLIGENCE SOURCES

D. IDENTIFIED THROUGH ANALYSIS OF ALL-SOURCE INTELLIGENCE.

(SLIDE 1a. - OFF)

(SLIDE 2 - ON)

NAVY LIEUTENANT IS AN EXAMPLE OF MEN IN CATEGORY 1. HE WAS SHOT DOWN ON 17 MAY 1967 IN NGHE AN PROVINCE, NORTH VIETNAM. FROM THE GROUND HE RADIOED HIS WINGMAN, "I'M MOVING UP THE HILL . . . BEING SURROUNDED AND BREAKING UP MY RADIO." WAS NEVER SEEN ON THE GROUND, BUT THE WINGMAN DID SEE SEVERAL PEOPLE ON A HILLSIDE NEAR THE WRECKAGE OF HIS AIRCRAFT SEVERAL MINUTES AFTER THE CRASH. ON 20 MAY 1967 A RADIO HANOI BROADCAST STATED THAT A US PLANE WAS SHOT DOWN ON 17 MAY 1967 OVER NGHE AN PROVINCE AND THE PILOT WAS SUBSEQUENTLY CAPTURED. WAS THE ONLY AMERICAN SHOT DOWN ON 17 MAY 1967 AND HE WAS IN NGHE AN PROVINCE.

WAS CAPTURED AND PHOTOGRAPHED AND THE PICTURES APPEARED IN A 1967 ISSUE OF PARIS MATCH AND THE MOVIE "PILOTS IN PAJAMAS." IN THE PICTURES SURROUNDED BY NORTH VIETNAMESE GUARDS, WAS SEEN WALKING THROUGH AN UNIDENTIFIED VILLAGE.

(SLIDE 2 - OFF)

(SLIDE 3 - ON) THE SECOND CATEGORY CONTAINS MEN THE ENEMY PROBABLY KNOW ABOUT. THESE ARE THE CRITERIA FOR CATEGORY 2.

CATEGORY 2 - SUSPECT KNOWLEDGE

THIS CATEGORY INCLUDES PERSONNEL WHO WERE:

A. INVOLVED IN THE SAME INCIDENTS AS INDIVIDUALS REPORTED IN CATEGORY 1

B. LOST IN AREAS OR UNDER SUCH CONDITIONS THAT THEY MAY REASONABLY BE EXPECTED TO BE KNOWN BY THE ENEMY

C. CONNECTED WITH AN INCIDENT WHICH WAS DISCUSSED BUT NOT IDENTIFIED BY NAME IN THE ENEMY NEWS MEDIA, OR

D. PROBABLY IDENTIFIED THROUGH ANALYSIS OF ALL-SOURCE INTELLIGENCE.

(SLIDE 3 - OFF)

(SLIDE 4 - ON)

AN AIR FORCE CAPTAIN WOULD BE IN CATEGORY 2. WAS FLYING NEAR THE COAST OF NGHE AN PROVINCE WHEN HIS PLANE WAS HIT. HE HEADED OUT TO SEA AND APPROXIMATELY TWO MILES OFF THE COAST, HIS PLANE NOSED DOWN AND EJECTED. HIS WINGMAN OBSERVED A PARACHUTE AND HEARD BEEPER SIGNALS. THE WINGMAN FLEW OVER THE AREA BUT WAS UNABLE TO SEE . THE WINGMAN DID SEE SEVERAL SMALL BOATS IN THE AREA, BUT WAS NOT SURE OF HOW CLOSE THE BOATS WERE AT THE TIME THE CHUTE HIT THE WATER. BY THE TIME THE WINGMAN COMPLETED A TURNING MANEUVER, THE BOATS WERE ABOUT A MILE AWAY FROM THE PARACHUTE LANDING SITE. SUBSEQUENT INTELLIGENCE INDICATED THAT A PILOT HAD BEEN CAPTURED BY LOCAL FISHERMEN DURING THAT TIME FRAME AND LOCATION. THE SAME REPORTS STATED THAT THE PILOT HAD BEEN HURT AND TAKEN TO VINH CITY, NGHE AN PROVINCE.

(SLIDE 4 - OFF)

(SLIDE 5 - ON) CATEGORIES 3 AND 4 ARE LESS DEFINITIVE WITH THE THIRD GROUPING BEING THOSE MEN THE OTHER SIDE PROBABLY DOES NOT KNOW ABOUT.

CATEGORY 3 - DOUBTFUL KNOWLEDGE

THIS CATEGORY INCLUDES PERSONNEL WHOSE LOSS INCIDENT IS SUCH THAT IT IS DOUBTFUL THAT THE ENEMY WOULD HAVE KNOWLEDGE OF THE SPECIFIC INDIVIDUALS (e.g., AIRCREWS LOST OVER WATER OR REMOTE AREAS).

(SLIDE 5 - OFF)

(SLIDE 6 - ON)

LIEUTENANT IS A CATEGORY 3. HE DISAPPEARED AFTER FLYING INTO A THUNDERSTORM OFF THE COAST OF NORTH VIETNAM. NO VISUAL OR ELECTRONIC CONTACT WAS MADE WITH /AFTER HIS DISAPPEARANCE, BUT A SEARCH REVEALED A LARGE OIL SLICK ON THE WATER IN THE GENERAL VICINTY OF HIS LOSS.

(SLIDE 6 - OFF)

(SLIDE 7 - ON) IN THE UNKNOWN CATEGORY ARE THOSE WE SIMPLY DON'T KNOW ABOUT. NEITHER DO WE KNOW WHAT THE ENEMY MIGHT HAVE ON THEM.

CATEGORY 4 - UNKNOWN KNOWLEDGE

THIS CATEGORY INCLUDES INDIVIDUALS:

A. WHOSE TIME AND PLACE OF INCIDENT ARE UNKNOWN (e.g., AIRCREW MEMBERS DOWN AT UNKNOWN LOCATIONS OR GROUND PERSONNEL SEPARATED FROM THEIR UNIT AT AN UNKNOWN TIME OR PLACE), AND

B. WHO DO NOT MEET THE CRITERIA OF CATEGORIES 1 THRU 3.

(SLIDE 7 - OFF)

(SLIDE 8 - ON)

THIS GROUPING IS MOST DIFFICULT TO CATEGORIZE AND INCLUDES SUCH MEN AS MAJOR WAS FLYING SOLO RECONNAISSANCE WHEN ALL CONTACT WITH HIM WAS LOST AND HE DID NOT RETURN FROM THE MISSION. ALL AIRCRAFT IN THE AREA MONITORED FOR ELECTRONIC OR VISUAL CONTACT BUT NONE WAS MADE.

(SLIDE 8 - OFF)

(SLIDE 9 - ON)

CATEGORY 5 - CATEGORY UNRELATED TO DEGREE OF ENEMY KNOWLEDGE

THIS CATEGORY INCLUDES THOSE PERSONNEL WHOSE REMAINS HAVE BEEN DETERMINED TO BE NONRECOVERABLE AS OUTLINED IN DEPARTMENT OF THE ARMY TECHNICAL MANUAL 10-286, JANUARY 1964, SECTION 39.

THE MEN IN CATEGORY 5 ARE KNOWN DEAD BUT NOT RECOVERABLE.

IT MAY BE A PILOT WHO CRASHED INTO THE SEA OR AN INCINERATED SOLDIER. WE CANNOT EXPECT THE OTHER SIDE TO ACCOUNT FOR THESE PEOPLE.

(SLIDE 9 - OFF)

THE CATEGORIES WERE DEVELOPED TO DETERMINE WHAT WE SHOULD REASONABLY EXPECT FROM THE OTHER SIDE. THE NUMBERS OF MEN CURRENTLY LISTED IN THE VARIOUS CATEGORIES ARE 179 IN CATEGORY 1; 1160 IN CATEGORY 2; 344 IN CATEGORY 3; 428 IN CATEGORY 4; AND 436 IN CATEGORY 5. THESE NUMBERS INCLUDE THE MISSING IN ALL OF SOUTHEAST ASIA. THESE CATEGORY LISTS ARE AVAILABLE FOR YOUR USE.

A-800

AS STATED EARLIER, THE DEPARTMENT OF DEFENSE DOES NOT BELIEVE THAT ANY OF THE MEN ARE BEING HELD IN ASIA, BUT I WANT TO SHOW YOU SOME INFORMATION THAT WOULD MAKE QUESTIONABLE THE VIETNAMESE'S CLAIM OF NO ADDITIONAL KNOWLEDGE.

(SLIDE 10 - ON)

ON NOVEMBER 21, 1967, THIS RADIO PHOTOGRAPH ORIGINATED IN HANOI AND WAS MONITORED IN WARSAW. THE CAPTION AS PROVIDED BY THE NORTH VIETNAMESE STATED; SOME OF THE U.S. PIRATES SHOT DOWN BY NORTH VIETNAM ARMED FORCES AND PEOPLE DURING RECENT DAYS. IT IDENTIFIED FOUR NAVAL OFFICERS AS CAPTURED IN HAIPHONG. THEY WERE

AND .

AND WERE RELEASED DURING THE PRISONER EXCHANGE IN 1973. THE NORTH VIETNAMESE HAVE NEVER RELEASED ANY ADDITIONAL INFORMATION ABOUT

AND .

(SLIDE 10 - OFF)

(SLIDE 11 - ON)

THIS IS A PHOTOGRAPH THAT APPEARED IN A JAPANESE JOURNAL IN AUGUST 1967. IT WAS RELEASED BY THE SOVIET NEWS AGENCY AND IDENTIFIES THE DEAD PILOT AS .

(SLIDE 11 - OFF)

(SLIDE 11 - OFF)

(SLIDE 12 - ON) THIS IS OBVIOUSLY AN ARRANGED PHOTOGRAPH. THIS MAN'S REMAINS WERE IN THE HANDS OF THE NORTH VIETNAMESE, YET, THEY HAVE NEVER ACKNOWLEDGED TO US HAVING ANY INFORMATION ABOUT HIM.

(SLIDE 12 - OFF)

(SLIDE 13 - ON)

NORTH VIETNAM'S ENGLISH-LANGUAGE PERIODICAL, VIETNAM COURIER, RAN THIS PICTURE ON MARCH 17, 1969. IT WAS CAPTIONED, "THE GRAVE OF AN AMERICAN AIR PILOT , SHOT DOWN OVER QUANG BINH ON FEBRUARY 7, 1965."

(SLIDE 13 - OFF)

(SLIDE 14 - ON)

WE HAVE THIS LATER PICTURE OF A PERMANENT HEADSTONE FOR . WE ALSO HAVE OTHER PHOTOS OF BODY BEFORE BURIAL THAT CAME FROM A JAPANESE NEWS AGENCY AND FROM A COMMUNIST PRODUCED FILM.

(SLIDE 14 - OFF)

(SLIDE 15 - ON)

THIS PHOTOGRAPH WAS TAKEN FROM THE BODY OF A NORTH VIETNAMESE SOLDIER AFTER A BATTLE IN SOUTH VIETNAM IN 1968. INFORMATION ON THE BACK OF THE PICTURE LED TO IDENTIFICATION OF AN AMERICAN FLYER, . HAS SEEN THIS AND ACCEPTS THE IDENTIFICATION; HOWEVER, THE NORTH VIETNAMESE HAVE RELEASED NOTHING ABOUT THIS MAN.

(SLIDE 15 - OFF)

(SLIDE 16 - ON)

THESE TWO PICTURES ARE FROM A 1969 FILM PRODUCED IN NORTH VIETNAM. THIS IS THE HELMET AND IDENTIFICATION CARD OF CAPTAIN

(SLIDE 16 - OFF)

(SLIDE 17 - ON)

THIS IS A GRAVE MARKER FOR . THIS INFORMATION CAME FROM JAPANESE SOURCES.

(SLIDE 17 - OFF)

(SLIDE 18 - ON)

THESE PHOTOGRAPHS OF , AN AMERICAN AVIATOR, APPEARED IN A NORTH VIETNAMESE JOURNAL ON SEPTEMBER 11, 1972.

(SLIDE 18 - OFF)

THESE PICTURES ARE UNPLEASANT AND CERTAINLY WERE NOT INTENDED TO UPSET YOU, BUT TO SHOW YOU THAT THE OTHER SIDE DOES HAVE INFORMATION ABOUT SOME OF OUR MEN, SOME OF WHOM WERE ALIVE ON THE GROUND AND OTHERS, WHO WERE NOT. WE HAVE RECEIVED NOTHING NEW SINCE THE CEASE-FIRE IN ANY OF THE CASES WE HAVE JUST DISCUSSED AND THESE ARE ONLY A FEW OF THE MANY FOR WHICH WE HAVE SUCH INFORMATION. WE REALLY CANNOT ACCEPT THE OTHER SIDE'S DENIAL OF KNOWLEDGE OF ANY OF THESE MEN. ON THE OTHER HAND, WE DO NOT THINK IT ADVISABLE TO FORCE THE OTHER SIDE INTO AN EARLY POSITION ON THE

STATUS OF SPECIFIC INDIVIDUALS. THERE MAY BE SOME OF OUR MEN, SUCH AS WHO HAVE DISAPPEARED UNDER CIRCUMSTANCES THAT MIGHT EMBARRASS THEM. THERE MAY BE SOME FOR WHOM INFORMATION IS NO LONGER AVAILABLE. WE WOULD HAVE THEM UNDERSTAND THAT WE ARE NOT NOW INTERESTED IN MAKING ACCUSATIONS OF BRUTALITY OR WAR CRIMES; WE JUST WANT TO ACCOUNT FOR OUR MEN. THEY HAVE HAD ADEQUATE TIME TO GATHER INFORMATION ABOUT MANY OTHERS AND HAVE ACKNOWLEDGED THAT THEY HAVE THE AGENCIES TO DO SO. WE WANT THAT INFORMATION.

THE DEFENSE DEPARTMENT DOES NOT DETERMINE THE EXTENT TO WHICH OUR NATION WILL GO TO NORMALIZE RELATIONS WITH OTHER GOVERNMENTS. WE WOULD NOT PRESUME TO SAY WHAT THOSE LIMITS SHOULD BE, BUT WE ARE CONVINCED THAT THERE ARE SEGMENTS OF OUR POPULATION WHO ARE NOT WILLING TO ACCEDE TO ANY DEMANDS FROM THE OTHER SIDE UNTIL THEY HAVE DEMONSTRATED GOOD FAITH IN RESOLVING THIS HUMANITARIAN PROBLEM. TO DEFENSE, THIS IS NOT AN ISSUE WITH A PRICE TAG. ACCOUNTING FOR OUR MISSING AND RECOVERING REMAINS HAVE ALWAYS BEEN A STRICTLY HUMANITARIAN ISSUE.

YOU HAVE MET WITH SOME FAMILIES OF THE MISSING SO YOU UNDERSTAND WHY THEY ARE DISTRUSTFUL OF COMMUNISTS. THE OTHER SIDE'S REFUSAL TO SURRENDER DATA TO US AND THE BLATANT MANNER IN WHICH THEY USED OUR MEN FOR POLITICAL GAIN DO NOT ENGENDER MUCH FAITH. WE DO NOT THINK THAT A SINGLE VISIT TO VIETNAM AND LAOS WILL DISPEL THE DISBELIEF BUILT UP BY THE DISMAL RECORD OF THE PAST SO WE HOPE YOU DO NOT LOOK UPON YOUR COMMISSION AS A ONE-SHOT EFFORT. IN LIGHT OF THIS BACKGROUND INFORMATION, IT WOULD BE DIFFICULT FOR THE FAMILIES OF THE MISSING TO ACCEPT AT FACE VALUE ANOTHER STATEMENT THAT THEY HAVE DONE ALL THEY CAN DO. FOR THE VIETNAMESE AND LAOTIANS TO HAVE ANY CREDIBILITY IN THIS ISSUE, IT IS IMPERATIVE THAT THEY ADDRESS SOME OF THESE CASES OF WHICH THEY UNDOUBTEDLY HAVE KNOWLEDGE.

AN EARLIER DENIAL OF INFORMATION BY THE NORTH VIETNAMESE APPEARS TO BE NO BARRIER TO LATER RELEASE OF THAT SAME INFORMATION. FOR MANY YEARS, THEY HAVE STATED THEY HAD NO ADDITIONAL INFORMATION TO GIVE. YET, THEY RECENTLY OFFERED US THE BODIES OF TWELVE OF OUR MEN AS A GESTURE OF GOODWILL. THIS OFFER WAS WITHDRAWN WHEN A DISPUTE OVER UNITED NATIONS MEMBERSHIP DEVELOPED. WE KNEW THAT THEY HAD INFORMATION ON NINE OF THESE AND TWO OF THEM,   AND   , WERE FREQUENTLY USED AS EXAMPLES OF MEN FOR WHOM WE COULD EXPECT AN ACCOUNTING.

TO DO THE ACCOUNTING JOB PROPERLY, WE SHOULD PUT AMERICAN TEAMS ON THE GROUND TO LOCATE AND REMOVE THE REMAINS OF OUR MEN BECAUSE PROPER RECOVERY CAN ENHANCE SUBSEQUENT IDENTIFICATION. REALISTICALLY, WE DOUBT THAT THE INDOCHINESE WOULD ACCEPT AN AMERICAN PRESENCE.

DURING THE CEASE-FIRE NEGOTIATIONS, WE WERE OPTIMISTIC THAT THE OTHER SIDE WOULD COOPERATE IN AN ACCOUNTING AND DEFENSE ESTABLISHED THE MACHINERY TO ACCOMPLISH THIS MISSION. THE FOUR-PARTY JOINT MILITARY TEAM WAS ESTABLISHED FOR THE SPECIFIC PURPOSE OF ACCOUNTING FOR THE MISSING. ALTHOUGH THAT ORGANIZATION IS NO LONGER ACTIVE, THE REST OF THE ORGANIZATIONAL STRUCTURE IS STILL IN BEING AND OPERATIONAL.

THE JOINT CASUALTY RESOLUTION CENTER AND CENTRAL IDENTIFICATION LABORATORY NOW LOCATED IN HAWAII ARE ORGANIZATIONS TO ASSIST IN RECOVERING AND IDENTIFYING REMAINS AND RESOLVING THE STATUS OF AMERICANS IN ACTION. THE CENTER AND LABORATORY STILL ARE PREPARED TO ACCOMPLISH THEIR MISSION. WHETHER IT IS FEASIBLE OR ADVISABLE TO INVOLVE JCRC IN GROUND OPERATIONS IS A MATTER OF DIPLOMACY AND FOREIGN POLICY TO BE DECIDED BY THE PRESIDENT AND YOU; HOWEVER, THE CAPABILITY IS THERE TO USE IF THIS IS DETERMINED TO BE A VIABLE OPTION.

THE BOOKS WE PREPARED AND GAVE TO YOU IN WASHINGTON CONTAIN STATISTICS -- SPECIFIC INFORMATION ABOUT SOME PEOPLE AND GENERAL DATA ABOUT OTHERS. THERE IS NO OTHER WAY TO PRESENT SOME OF THIS MATERIAL, BUT TO US THIS IS NOT A GAME OF NUMBERS. WHENEVER THE MISSING ARE DISCUSSED, WE ARE INEVITABLY ASKED HOW MANY OF THE MISSING DO WE THINK THE OTHER SIDE SHOULD ACCOUNT FOR. IF WE MUST GIVE A NUMBER, WE WOULD SAY THAT IT WOULD BE REASONABLE TO EXPECT AN ACCOUNTING FOR THOSE MEN IN CATEGORIES 1 AND 2-- A TOTAL OF 1,339 MEN. MIND YOU, I SAID AN "ACCOUNTING," NOT BODIES. WE HAVE MADE MISTAKES, NO DOUBT, IN PLACING SOME MEN IN THESE TWO CATEGORIES. CONVERSELY, ONE OF THE BODIES RETURNED TO CONGRESSMAN MONTGOMERY'S GROUP HAD BEEN LISTED BY US AS NON-RECOVERABLE AND ONE OF THE TWELVE NAMES THE NORTH VIETNAMESE RELEASED THIS PAST SEPTEMBER WAS IN OUR CATEGORY 5. WE WERE 91% CORRECT ON OUR RETURNED PRISONERS, BUT THIS IS AN AREA IN WHICH STATISTICS AND NUMBERS CAN BE COMPLETELY MEANINGLESS. WE CONSIDER NUMBERS TO BE DANGEROUS ASSUMPTIONS. THERE ARE TOO MANY CASES WE SIMPLY DON'T KNOW ABOUT. THESE DATA REPRESENT OUR BEST KNOWLEDGE OF SOME OF THE NATION'S FINEST YOUNG MEN. WE HAVE AN OBLIGATION TO THEM, THEIR FAMILIES, AND TO THE NATION AS A WHOLE NOT TO ALLOW THEM TO BE USED AS PAWNS IN A BRUTAL GAME OF DIPLOMACY.

WE WOULD HOPE YOU ARE ABLE TO CONVEY TO THE VIETNAMESE AND LAOTIANS OUR DETERMINATION AND NEED TO ACCOUNT FOR THESE MEN TO THE FULLEST POSSIBLE EXTENT. WE WOULD HOPE THAT THIS IS THE FIRST STEP IN A CONTINUING EFFORT THAT WILL ALLOW US TO WORK WITH THE OTHER SIDE TO ACCOMPLISH THIS GOAL.

THANK YOU FOR YOUR EFFORTS AND FOR ALLOWING US TO HELP. I WILL BE FOLLOWED BY CAPTAIN PETRIE OF THE JOINT CASUALTY RESOLUTION CENTER.

CATEGORIES OF DEGREES OF INFORMATION - ENEMY KNOWLEDGE ON PW/MIA PERSONNEL

CATEGORY	DEGREE OF KNOWLEDGE
1	CONFIRMED
2	SUSPECT
3	DOUBTFUL
4	UNKNOWN
5	UNRELATED

CATEGORY 1 CONFIRMED KNOWLEDGE

THIS CATEGORY INCLUDES ALL PERSONNEL WHO WERE:

A. IDENTIFIED BY THE ENEMY BY NAME

B. IDENTIFIED BY RELIABLE INFORMATION RECEIVED FROM RELEASEES/ESCAPEES, OR

C. REPORTED BY HIGHLY RELIABLE INTELLIGENCE SOURCES

D. IDENTIFIED THROUGH ANALYSIS OF ALL-SOURCE INTELLIGENCE

CATEGORY 2 SUSPECT KNOWLEDGE

THIS CATEGORY INCLUDES PERSONNEL WHO WERE:

A. INVOLVED IN THE SAME INCIDENTS AS INDIVIDUALS REPORTED IN CATEGORY 1

B. LOST IN AREAS OR UNDER SUCH CONDITIONS THAT THEY MAY REASONABLY BE EXPECTED TO BE KNOWN BY THE ENEMY

C. CONNECTED WITH AN INCIDENT WHICH WAS DISCUSSED BUT NOT IDENTIFIED BY NAME IN THE ENEMY NEWS MEDIA, OR

D. PROBABLY IDENTIFIED THROUGH ANALYSIS OF ALL-SOURCE INTELLIGENCE

CATEGORY 3 DOUBTFUL KNOWLEDGE

THIS CATEGORY INCLUDES PERSONNEL WHOSE LOSS INCIDENT IS SUCH THAT IT IS DOUBTFUL THAT THE ENEMY WOULD HAVE KNOWLEDGE OF THE SPECIFIC INDIVIDUALS (e.g., AIRCREWS LOST OVER WATER OR REMOTE AREAS).

CATEGORY 4 UNKNOWN KNOWLEDGE

THIS CATEGORY INCLUDES INDIVIDUALS:

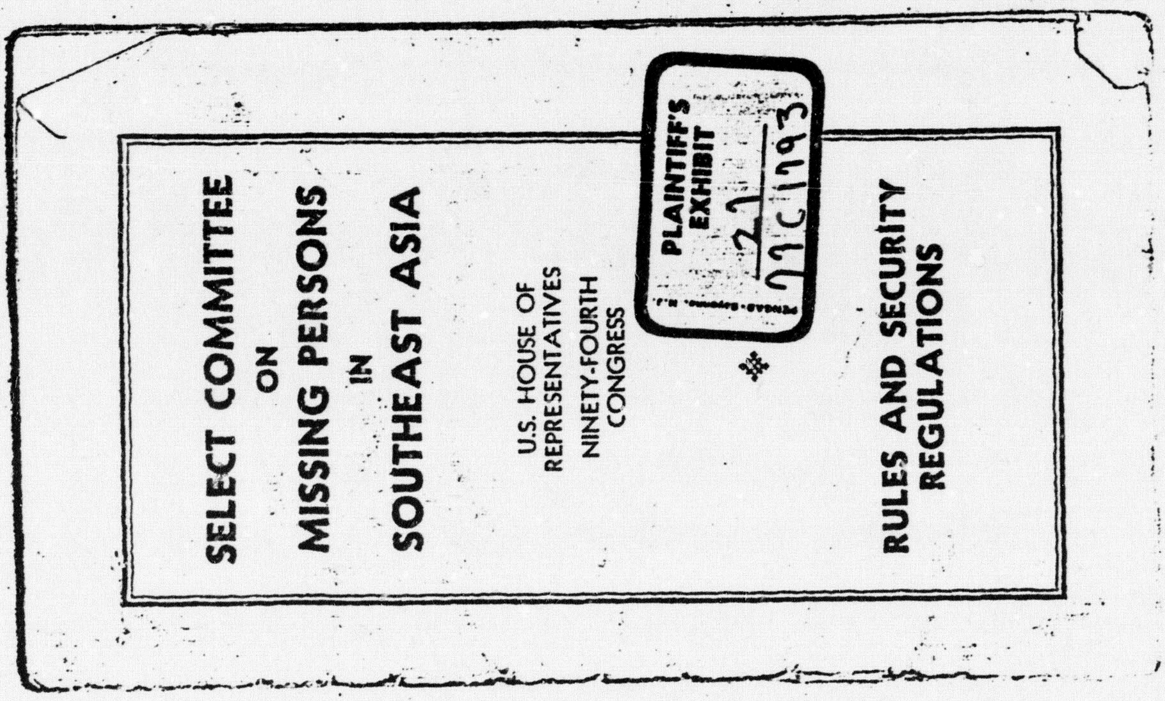
A. WHOSE TIME AND PLACE OF INCIDENT ARE UNKNOWN (e.g., AIRCREW MEMBERS DOWNED AT UNKNOWN LOCATIONS OR GROUND PERSONNEL SEPARATED FROM THEIR UNIT AT AN UNKNOWN TIME OR PLACE), AND

B. WHO DO NOT MEET THE CRITERIA OF CATEGORIES 1 THROUGH 3

CATEGORY 5 CATEGORY UNRELATED TO DEGREE OF ENEMY KNOWLEDGE

THIS CATEGORY INCLUDES THOSE PERSONNEL WHOSE REMAINS HAVE BEEN DETERMINED TO BE NONRECOVERABLE AS OUTLINED IN DEPARTMENT OF THE ARMY TECHNICAL MANUAL 10-286, JANUARY 1964, SECTION 39

PLAINTIFFS' EXHIBIT 27 - RULES AND SECURITY REGULATIONS OF SELECT COMMITTEE ON MISSING PERSONS IN SOUTHEAST ASIA



SELECT COMMITTEE
ON
MISSING PERSONS
IN
SOUTHEAST ASIA

U.S. HOUSE OF
REPRESENTATIVES
NINETY-FOURTH
CONGRESS

PLAINTIFF'S
EXHIBIT
27
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RULES AND SECURITY
REGULATIONS

MEMBERS OF COMMITTEE

NINETY-FOURTH CONGRESS

G. V. Montgomery, Mississippi, *Chairman*
Henry B. Gonzalez, Texas
John Joseph Moakley, Massachusetts
Patricia Schroeder, Colorado
Richard L. Ottinger, New York
Tom Harkin, Iowa
Jim Lloyd, California

Paul N. McCloskey, Jr., California
Benjamin A. Gilman, New York
Tennyson Guyer, Ohio

J. Angus MacDonald, *Staff Director*

RULES FOR THE SELECT COMMITTEE ON MISSING PERSONS IN SOUTHEAST ASIA

1. The Rules of the House of Representatives are the rules of the committee except as otherwise provided herein.

Rule 2. Meeting Procedures

2.1 For the purpose of carrying out any of its functions and duties, the committee is authorized to sit and act at such times and places within or without the United States whether the House is in session, has recessed, or has adjourned, and to hold hearings. The committee will meet at such times as may be fixed by the chairman or by the written request of a majority of the members of the committee in accordance with House rule XI, clause 2(c). Members of the committee shall be given reasonable notice, which, except in extraordinary circumstances, shall be at least 24 hours in advance of any meeting.

2.2 No general proxies may be used for any purpose. A member may vote by special proxy, which must be in writing, shall assert that the member is unable to be present at the meeting of the committee, shall designate the person who is to execute the proxy authorization, and shall be limited to a specific measure or matter and any amendments or motions pertaining thereto; except that a member may authorize a general proxy only for motions to recess, adjourn or other procedural matters. Each proxy to be effective shall be signed by the member assigning his vote and shall contain the date and time of day that the proxy is signed. Proxies may not be counted for a quorum. All proxies must be filed with the committee counsel and be available for inspection at any time.

2.3 No recommendation shall be reported or tabled by the committee unless a majority of the committee is actually present.

2.4 A rollcall of the members may be had on the request of two members.

2.5 A majority of the committee shall constitute a quorum for the purpose of taking final action on matters before the committee. However, a quorum for the purpose of taking testimony and receiving evidence by the committee shall consist of two members, at least one of which shall be a member of the minority party unless the ranking minority member consents otherwise.

2.6 At each hearing the chairman shall announce prior to the opening statement of the witness the subject of the investigation and a copy of the committee rules shall be made available to each witness.

2.7 The time any one member may address the committee on any matter under consideration by the committee shall not exceed 5 minutes, and then only when he

has been recognized by the chairman, except that this time limit may be exceeded by unanimous consent.

2.8 Each committee meeting for the transaction of business shall be open to the public except when the committee, in open session and with a quorum being present, determines by rollcall vote that all or part of the remainder of the meeting on that day shall be closed to the public. No person other than members of the committee and such committee staff, members' personal staff, and departmental representatives as may be authorized by the chairman, shall be present at any business session which has been closed to the public: *Provided, however* that the committee may by the same procedure vote to close one subsequent meeting.

2.9 Each hearing conducted by the committee shall be open to the public except when the committee, in open session with a quorum being present, determines by a rollcall vote that all or part of the remainder of that hearing on that day shall be closed to the public because disclosure of testimony, evidence or other matters to be considered would endanger the national security, individual rights of privacy, or would violate any law or rule of the House of Representatives. No person other than members of the committee ar [illegible] ch committee staff, members' personal staff and departmental representatives, as may be authorized by the chairman, shall be present at any hearing which has been closed to the public: *Provided, however,* that the committee may by the same procedure vote to close one subsequent day of hearing.

2.10 The committee shall make public announcement of the date, place and subject matter of the committee hearing at least one week before the commencement of the hearing. However, if the chairman of the committee determines that there is good cause to begin the hearing sooner, he shall make the announcement at the earliest possible date. Any announcement made under this paragraph shall be promptly published in the Daily Digest.

2.11 The chairman may call informal meetings of the committee upon 24 hours notice for purpose of receiving background information with such meetings to be held in available space in the Capitol Building. Informal meetings held pursuant to this paragraph will be considered closed because of limitation of space with only those persons authorized by the chairman allowed to attend.

2.12 Whenever any hearing or meeting conducted by the Committee or any subcommittee is open to the public, the Committee or subcommittee, as the case may be, may permit by majority vote that hearing or meeting to be covered, in whole or in part, by television broadcast, radio broadcast, and still photography, or by any such methods of coverage, under the following rules:

(a) If the television or radio coverage of the hearing or meeting is to be presented

to the public as live coverage, that coverage shall be conducted and presented without commercial sponsorship.

(b) No witness served with a subpoena by the Committee or subcommittee, as the case may be, shall be required against his will to be photographed at any hearing or meeting or to give evidence or testimony while the broadcasting of that hearing or meeting, by radio or television, is being conducted. At the request of any such witness who does not wish to be subjected to radio, television, or still photography coverage, all lenses shall be covered and all microphones used for coverage turned off.

(c) Not more than four television cameras, operating from fixed positions, shall be permitted in a hearing room. The allocation among the television media of the positions of the number of television cameras permitted in a hearing room shall be in accordance with fair and equitable procedures devised by the Executive Committee of the Radio and Television Correspondents' Galleries.

(d) Television cameras shall be placed so as not to obstruct in any way the space between any witness giving evidence or testimony and any Members of the Committee or subcommittee, as the case may be, or the visibility of that witness and that Member to each other.

(e) Television cameras shall not be placed in positions which obstruct unnecessarily the coverage of the hearing or meeting by the other media.

(f) Equipment necessary for coverage by the television and radio media shall not be installed in, or removed from, the hearing room while the Committee or subcommittee, as the case may be, is in session.

(g) Floodlights, spotlights, and flashguns shall not be used in providing any method of coverage of the hearing or meeting, except that the television media may install additional lighting in the hearing room, without cost to the Government, in order to raise the ambient lighting level in the hearing room to the lowest level necessary to provide adequate television coverage of the hearing at the then current state of the art of television coverage.

(h) Not more than five press photographers shall be permitted to cover a hearing or meeting by still photography. In the selection of these photographers, preference shall be given to photographers from Associated Press Photos and the United Press International Newspictures. If request is made by more than five media for coverage of the hearing for still photography, that coverage shall be made on the basis of a fair and equitable pool arrangement devised by the Standing Committee of Press Photographers.

(i) Photographers shall not position themselves, at any time during the course of the hearing or meeting, between the witness table and the Members of the Committee or subcommittee, as the case may be.

(j) Photographers shall not place themselves in positions which obstruct unnecessarily the coverage of the hearing or meeting by the other media.

(k) Personnel providing coverage by the television and radio media shall be then currently accredited to the Radio and Television Correspondents' Galleries.

(l) Personnel providing coverage by still photography shall be then currently accredited to the Press Photographers' Gallery.

(m) Personnel providing coverage by the television and radio media and by still photography shall conduct themselves and their coverage activities in an orderly and unobtrusive manner.

Rule 3. Subpenas

3.1 The committee may require, by subpena or otherwise, the attendance and testimony of such witnesses and the production of such books, records, correspondence, memorandums, papers, documents and other memorandums and materials as it deems necessary. Any such subpena may be issued by the committee in the conduct of an investigation or activity or a series of investigations or activities, only when authorized by a majority of the members of the committee, and authorized subpenas shall be signed by the chairman of the committee or by any member designated by the chairman. Each subpena shall contain a copy of House Resolution 335, 94th Congress, 1st session. Compliance with any subpena issued by the committee may be enforced only as authorized by the House.

Rule 4. Procedures for Taking Testimony

4.1 When giving testimony, witnesses may be accompanied by their own counsel. There shall be no direct or cross-examination by witness' counsel. The chairman of the committee, or any member of the committee or staff member of the committee or staff member designated by the chairman may administer oaths to any witness.

4.2 Any prepared statement to be presented by a witness to the committee shall be submitted to the committee at least 72 hours in advance of presentation and shall be distributed to all members of the committee at least 48 hours in advance of presentation. If a prepared statement contains security information bearing a classification the statement shall be made available only in the committee rooms to all members of the committee at least 48 hours in advance of presentation; however, no such statement shall be removed from the committee offices: *Provided, however,* that these requirements may be waived by the chairman.

4.3 In the discretion of the committee, witnesses may submit brief and pertinent sworn statements for inclusion in the record. The committee is the sole judge of the pertinency of testimony and evidence adduced at its hearings.

4.4 If the committee determines that evidence or testimony at a hearing may tend to defame, degrade, or incriminate any person, it shall:

a. receive such evidence or testimony in executive session,

b. afford such person an opportunity voluntarily to appear as a witness, and

c. receive and dispose of requests from such person to subpena additional witnesses.

4.5 Except as provided in rule 4.4 above, the chairman shall receive and the committee shall dispose of requests to subpena additional witnesses.

4.6 The minority party members of the committee shall be entitled, upon timely requests to the chairman of the majority of them, to call witnesses selected by the minority to testify with respect to the matter in question.

4.7 When a witness is before the committee, members of the committee may put questions to the witness only when they have been recognized by the chairman for that purpose.

4.8 Members of the committee who so desire shall have not to exceed five minutes to interrogate each witness until such time as each member has had an opportunity to interrogate such witness; thereafter, additional time for questioning witnesses by members is discretionary with the chairman.

4.9 No sworn depositions will be taken unless authorized by the chairman, who shall inform the ranking minority member, or by vote of the committee.

Rule 5. Staff

5.1 The appointment of all staff members and consultants shall be made by the chairman and the staff director in consultation with the ranking minority member. Staff members shall be under the direct supervision and control of the chairman and staff director in consultation with the ranking minority member and shall be responsive to all members of the committee.

5.2 The staff of the committee shall not discuss either the substance or procedure of the work of the committee with anyone other than a member of the committee or committee personnel or such person authorized by the chairman in consultation with the ranking minority member. Staff members shall not initiate any avenues of investigation or take any independent testimony which has not been authorized by the chairman in consultation with ranking minority member.

5.3 As a condition of employment each staff member shall affirm that he fully understands the rules and regulations of the committee and agrees to abide by them. Any staff member who fails to abide by the committee rules or the conditions of his or her employment shall be subject to immediate dismissal by the chairman.

5.4 The chairman shall have the authority to utilize the services, information, facilities, and personnel of the departments

and establishments of the Government, and to procure the temporary and intermittent services of experts or consultants or organizations thereof to make studies or assist or advise the committee with respect to any matter under investigation.

Rule 6. Protection of Papers and Documents

6.1 At the discretion of the chairman, any material and testimony received or obtained pursuant to House Resolution 335, 94th Congress, may be deemed to have been received by the committee in executive session and shall be given appropriate safekeeping.

6.2 The chairman in consultation with the ranking minority member of the committee shall, with the approval of the committee, establish such procedures as in his judgment may be necessary to prevent the unauthorized disclosure of all material and testimony received or obtained pursuant to House Resolution 335, 94th Congress. Such procedures shall, however, insure access to this information by any member of the committee under such procedures as may be established by the committee.

6.3 Until such time as the committee has submitted its final report to the House, classified or other sensitive information in the committee records and files shall not be made available or disclosed to other than the committee membership, the committee staff, or as provided by House Rule XI, Clause 2(e)(2) except as may be otherwise determined by the chairman in consultation with the ranking minority member.

Rule 7. Committee Report

7.1 If, at any time of approval of any report by the committee, any member of the committee gives notice of intention to file supplemental, minority, or additional views, that member shall be entitled to not less than 5 calendar days (excluding Saturdays, Sundays, and legal holidays) in which to file such views, in writing and signed by that member, with the staff director of the committee. All such views so filed by one or more members of the committee shall be included within, and shall be a part of, the report filed by the committee with respect to that matter.

Rule 8. Rule Changes

8.1 These rules may be amended or replaced by the committee, provided that a notice in writing of the proposed change has been given to each member at least 48 hours prior to the meeting at which action thereon is to be taken.

SECURITY PROCEDURES AND REGULATIONS

Pursuant to rule 6.2 of the House Select Committee on Missing Persons in Southeast Asia, the following security procedures and regulations have been approved:

1. Members of the committee shall have access at all times to all materials received or obtained pursuant to House Resolution 335.

2. All committee staff members with appropriate security clearances, as determined by the Committee, will have access to documents and materials as determined by the staff director, the chairman and the ranking minority member.

3. All committee staff will submit to the person designated to control the security of materials, any and all materials received or obtained pursuant to House Resolution 335, 94th Congress.

4. All classified materials will be maintained in safes within the committee's offices. Records of receipt will be kept. The internal handling and disposition of such classified material, including classified waste, will be the responsibility of a security officer designated by the staff director with approval of the chairman in consultation with the ranking minority member.

5. All classified materials may be examined only at reading facilities located in a secure area. Notes may be taken but must remain in the committee's offices. Copying, duplicating, recording, or removing from the committee staff offices such materials is prohibited, except as specifically approved by the staff director and with approval of the chairman.

6. Classified materials used in meetings and hearings will not be removed, copied, recorded, or duplicated. At the conclusion of the meeting or hearing the materials will be collected and secured by the security officer.

7. Material not classified or material in the public domain will be made available upon request to designated staff of committee members. The material will be checked in and out and examined in a designated area of the committee's offices.

8. As a condition of employment, each staff member shall execute a security agreement. Staff members failing to abide by the agreement and these security regulations shall be subject to immediate termination of employment.

U.S. GOVERNMENT PRINTING OFFICE : 61-280-h

PLAINTIFFS' EXHIBIT 28 - LETTER FROM DERMOT G. FOLEY, ESQ. TO CONGRESSMAN JAMES LLOYD DATED JANUARY 5, 1976

PLAINTIFF'S
EXHIBIT
28
79 C 1993

January 5, 1976

Honorable James Lloyd
Member of Congress
Cannon House Office Building
(Room 222)
Washington, D. C. 20515

Re: House Select Committee
On Missing Persons

Dear Congressman Lloyd:

On behalf of the National League of Families, I have been making some inquiries to clarify events which lead to the issuance of the final report of the House Select Committee On Missing Persons. In this regard, on December 30, I spoke with Miss Maggie O'Donnell who I understand is your Field Representative, at your office in West Covina, California. I am writing this letter to verify impressions which I obtained during that conversation. I would, therefore, appreciate it if you could tell me whether I am correct in my understanding of the following:

1. When the Committee convened (I believe it was at 8:30 A.M. on December 6), you attended the meeting for a short period of time, but then departed within an hour to attend to other business;

2. While you were there, no formal vote was taken on the Committee report;

3. That you were in essential agreement with the dissent filed by Congressman Moakley; and

4. That you filed, or sought to file with the Committee, a statement for inclusion in the record, expressing your dissent.

As I am sure you can appreciate, in this particular matter, it would be most helpful for the families to know the facts so that the possibility of surmise and speculation on their part would be minimized. The information which we received to date indicates that no formal vote whatsoever was taken by the Committee on its report, or, if one was taken, it was not taken at a time when a quorum was present. We have also heard that some members of the Committee sought to file dissenting views, but that, for one reason or another, these statements were excluded from the record. Finally, our information indicates that at least five members of the Committee disagreed with positions taken in the final report. I am sure you realize that the MIA families must now decide to what extent and in what way their purposes will be affected by the Select Committee report. Consequently, I would appreciate hearing from you with respect to the above matters and any other pertinent matters with which you would be kind enough to furnish me.

May I thank you in advance for your courtesy and cooperation in this respect.

Very truly yours,

Dermot G. Foley

DGF:mw

cc: National League of Families
of American Prisoners and
Missing in Southeast Asia

Colonel Earl P. Hopper

Miss Maggie O'Donnell

PLAINTIFFS' EXHIBIT 29 - LETTER FROM CONGRESSMAN JIM LLOYD TO DERMOT G. FOLEY DATED JANUARY 13, 1977

JERRY GIOVANIELLO
ADMINISTRATIVE ASSISTANT

BRIGID DAVIS
OFFICE MANAGER

222 CANNON HOUSE OFFICE BUILDING
WASHINGTON, D.C. 20515
TELEPHONE: (202) 225-2305

COMMITTEES:
ARMED SERVICES
SCIENCE AND TECHNOLOGY
SELECT COMMITTEE ON MISSING PERSONS IN SOUTHEAST ASIA

JIM LLOYD
35TH DISTRICT, CALIFORNIA

CONGRESS OF THE UNITED STATES
HOUSE OF REPRESENTATIVES
WASHINGTON, D.C. 20515

DISTRICT OFFICES:
MAGGIE O'DONNELL
FIELD REPRESENTATIVE

100 SOUTH VINCENT AVENUE
SUITE 507
WEST COVINA, CALIFORNIA 91790
TELEPHONE: (213) 339-7356
(714) 599-5655

520 NORTH EUCLID AVENUE
SUITE 11
ONTARIO, CALIFORNIA 91762
TELEPHONE: (714) 983-0863

January 13, 1977

Mr. Dermot G. Foley
Kaplan, Kilsheimer and Foley
122 East 42nd Street
New York, N. Y. 10017

Dear Mr. Foley:

I received your January 5, 1977 letter. I asked to be included with Congressman Moakley's separate opinion but for some reason the printer did not get my word. I still support Mr. Moakley's position.

The MIA Committee has finished and it's now up to the President to act. I don't intend to join any effort to continue a dialogue on the Committee's recommendations.

Thanks for your continued interest. Let me assure you that since I've lost many personal friends--both MIA and KIA--I'm not insensitive to the plight of these families.

Sincerely,

Jim Lloyd

JIM LLOYD
Member of Congress

JL/tlr

PENGAD Bayonne, N. J.
PLAINTIFF'S EXHIBIT
29
[illegible] 1993

U.S. HOUSE OF REPRESENTATIVES
WASHINGTON, D.C. 20515

PUBLIC DOCUMENT

OFFICIAL BUSINESS

Jim Lloyd M.C.

Mr. Dermot G. Foley
Kaplan, Kilsheiner and Foley
122 East 42nd Street
New York, N. Y. 10017

DEFENDANTS' EXHIBIT A - AFFIDAVIT OF MELISSA HOGAN

UNI) STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

EARL P. HOPPER, JR., by his father and next friend, EARL P. HOPPER, SR.; et al., Plaintiffs, v. JAMES E. CARTER, JR., President of the United States, et al.,	Civil Action No. 77 C 1793

AFFIDAVIT

Comes now affiant, and first being duly sworn, states upon her oath that the matters contained herein are true and correct to the best of her knowledge and belief, as follows to wit:

1. I am Melissa Hogan, wife and primary next-of-kin of LCDR Jerry F. Hogan, USN, missing in action. My husband was shot down on January 21, 1967 while on a combat mission over North Vietnam. My husband was the wingman of CDR C. H. Brown, USN they were on a night bombing mission interdicting river barge traffic on the Song Yen River. My husband dropped flares and made a bombing run. CDR Brown stated in attachment (1) "He (LCDR Hogan) started a bombing run and called "rolling in." I saw the bombs impact and another explosion near the bomb hits. LTJG (rank at time) Hogan did not answer radio calls after his bombing run. No enemy fire was noted in the area. Further search of the area aided by flares dropped by an F-4 flight disclosed a residual fire near the location of the possible impact. Nothing was seen or heard from LTJG Hogan."

The squadron Commanding Officer recommended my husband be declared missing until further evidence or lack of evidence indicates otherwise.

It has been my strong belief over the years that the fate of my husband should be decided by other trained combat Naval Officers who were familiar with the job he was performing. My husband was a Naval Academy graduate who volunteered for flight training and was engaged in the profession of his choice. He was sent to fight in Vietnam by the leadership of this country and his fate should be decided under the law by the Secretary of the Navy.

I should never have been put in the position of being required to write a letter to the Navy requesting my husband's status be reviewed. Futher, I believe it unfortunate that a group of people have been able to bring pressure to bear on government officials to change existing law in such matters since that group does not speak for all POW/MIA families.

FURTHER, affiant sayeth not.

Subscribed and sworn to before
me this 16th day of Sep 1977.

Notary Public

My commission expires 12-20-78

Melissa Hogan
MELISSA HOGAN

A-828

BEST COPY AVAILABLE

ATTACK SQUADRON ONE HUNDRED TWELVE
c/o FLEET POST OFFICE
SAN FRANCISCO, CALIFORNIA
96601

UNCLASSIFIED

VA-112/CER:rr
1771
Ser: 03
28 JAN 1967

From: Commanding Officer, Attack Squadron ONE HUNDRED TWELVE
To: Chief of Naval Personnel (Casualty Branch)
Via: Commander, Attack Carrier Air Wing ELEVEN

Subj: Personnel Casualty Report of LTJG Jerry Franks HOGAN 678216/1310, USN (U)

Ref: (a) BUPERS Manual, Art. C-9801

1. (U) In accordance with paragraph 7C of reference (a) the following statements, opinions and recommendations are forwarded for review by the Chief of Naval Personnel.

2. Statement of flight leader, CDR C. L. BROWN, 554856/1310, USN:

The 0200 launch of VA-112 on 21 January was briefed for a river reconnaissance of the Song Yen River. It was composed of myself as section leader and LTJG HOGAN. The flight was launched on time and made land fall at the mouth of the Song Yen River. I dropped three flares as briefed on the ferry site at the river mouth located at approximately 19-37N, 105-49E. We searched for targets until flare burn out at which time LTJG HOGAN dropped another three flares in the same area. I located and made a bombing run on a boat target to the west of the flares. At about 0250H LTJG HOGAN located several barges under the flares he had dropped. He started a bombing run and called "rolling in". I saw the bombs impact and another explosion near the bomb hits. LTJG HOGAN did not answer radio calls after his bombing run. No enemy fire was noted in the area. Further search of the area aided by flares dropped by an F4 flight disclosed a residual fire near the location of the possible impact. Nothing was seen or heard from LTJG HOGAN.

3. Additional details of the incident follow:

After LTJG HOGAN was suspected to have crashed CDR BROWN remained on the scene with other aircraft from KITTY HAWK which diverted to the scene. These aircraft consisted of an A-6, two F-4's and one E-2A. All aircraft except the E-2A left the scene about 0320H to arrive at KITTY HAWK for the 0340H recovery. The E-2A remained in the area until 0500H. Two A-4 aircraft were launched and arrived on the scene at approximately 0345H and remained on scene until 0600H. At 0600H a helicopter from USS [illegible] arrived on station, and at 0630 H two A-1 aircraft arrived on scene from USS TICONDEROGA. Two A-1's and a helicopter were kept on station during the day until sunset.

ENCLOSURE (1)
UNCLASSIFIED

UNCLASSIFIED

USS GRIDLEY was "on-scene commander" during the search and was assisted by USS COLLETT. The weather in the area was relatively clear with little obstruction to visibility. The F-4's dropped flares on the scene to assist in the night search. Additional flares were dropped during the night by other search aircraft. The search aircraft guarded UHF emergency frequency at all times. No one reported hearing transmissions from LTJG HOGAN although he had a survival transceiver on his person at the time of the incident. No survival lights or flares were observed during the search. A residual glow was seen on the ground near the probable crash site. The only other sighting on the ground which was reported were "possible truck lights" about 1½ hours after the incident. USS GRIDLEY reported by message that one aircraft reported seeing small arms fire in the area. After debriefing the air crew members, this report proved to be false. One aircraft had reported "a triple flash" (meaning the flashes observed from the bombs detonating and the possible aircraft impact). This transmission may have been misinterpreted by the ship's air-controller and reported as "muzzle flashes". The area of the crash is densely populated with little cover for evasion.

4. It is the opinion of the Commanding Officer that no determination as to the status of LTJG HOGAN can be made from existing evidence.

5. It is recommended that LTJG HOGAN be officially declared missing in action until further evidence or lack of evidence indicates otherwise.

M. L. HENNIS

GROUP-4
DOWNGRADED AT 3-YEAR INTERVALS
DECLASSIFIED AFTER 12 YEARS

UNCLASSIFIED

COURT'S EXHIBIT 2 - PLAINTIFFS' SUPPLEMENTAL PRE-TRIAL MEMORANDUM

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
---x
EARL P. HOPPER, JR., et al., :

Plaintiffs, : 77 Cic. 1793 (JBW)

-against- :

JAMES E. CARTER, JR., et al., :

Defendants. :
---x

PLAINTIFFS' SUPPLEMENTAL PRE-TRIAL MEMORANDUM

OF COUNSEL:

Dermot G. Foley, Esq.
John A. K. Bradley, Esq.

KAPLAN KILSHEIMER & FOLEY
122 EAST 42ND STREET
NEW YORK, N.Y. 10017

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

---x

EARL P. HOPPER, JR., et al., :

Plaintiffs, :

-against- :

JAMES E. CARTER, JR., et al., :

Defendants. :

---x

This Memorandum is submitted to supplement plaintiffs' initial Memorandum of Law in support of their motion for a preliminary injunction. The preliminary injunction matter has been set for a trail on Monday, September 19, 1977.

At approximately 4:45 P.M. on Friday, September 16, 1977, plaintiffs' counsel received voluminous material from defendants' counsel. These materials not only are to be submitted in opposition to plaintiffs' motion for a preliminary injunction, but also in support of defendants' cross-motion for dismissal.

Until the said materials were received, plaintiffs' counsel had no indication that a dismissal cross-motion was contemplated. Because these documents were received so late, there is physically no possible way in which complete papers in opposition can be prepared and filed before the beginning of the trial. Therefore, plaintiffs' counsel requests the Court to consider the enclosed submission merely as supplemental to previously filed papers, and to grant plaintiffs' counsel the right to file a post-trial brief which will deal with the issues in the context of the record that will be made at the trial.

To begin, however, there are certain basic objections as to which plaintiffs must make a record:

1. We submit that it is fundamentally unfair and wrong to cross-move for dismissal on such short notice. It is simply impossible to meet the motion in the time remaining.

2. The motion to dismiss is essentially analogous to a motion for summary judgment. While the plaintiffs have a minimal reasonable understanding of the conditions to which they object, their access to evidence and information does not compare with that possessed by the defendants at this time. Basic to the complaint herein is the allegation that the defendants have withheld and misused information to which the plaintiffs should have had access. Discovery would produce an opportunity to create some semblence of parity

between the parties which is totally absent now. Under these circumstances, we submit that it would be grossly unfair and legally wrong to grant a motion to dismiss at this time. Shoenbaum v. Firstbrook, 405 F.2d 215 (2nd Circuit, 1968). However, we do wish to inform the Court that an initial reading of the papers submitted by the defendants indicates to plaintiffs' counsel that there are vast areas of disagreement between the parties as to the allegations, infrences and innuendos contained in the defendants' papers, and we desire an opportunity, not merely to squabble or argue about these matters, but to develop the truth through discovery so that the facts can be fully and fairly presented to the Court. Affidavits, heavy on syntax, are not helpful in this pursuit.

3. We specifically object to references in the plaintiffs' papers to the proceedings and report of the Montgomery Committee and of the Woodcock Commission. As the complaint clearly sets forth, the Montgomery Committee issued a report which the plaintiffs intend to show the Court, at the plenary trial, was not only illegal, but a fraud. The Woodcock Commission has very grave problems because it conducted no independent investigation, and we shall demonstrate that. Furthermore, the materials which we expect to get as a

result of discovery about the Woodcock Commission will, we have reason to believe, go a long way in showing the inappropriateness of status reviews at the present time.

Essentially, before the Woodcock Commission or the Montgomery Committee can be sources of evidence worthy of belief, they must be subjected to inquiry as to the legitimacy and validity of the testimony they would purport to furnish. Hence, they must be subjects of discovery.

THE ISSUE OF IRREPARABLE INJURY

At a pre-trial conference on September 15, 1977, plaintiffs' counsel were informed that a memorandum would be in order explaining plaintiffs' position on the question of whether or not, in the absence of a preliminary injunction, the plaintiffs faced a threat of irreparable injury.

It is plaintiffs' position that such a threat of irreparable injury is clear and present and very substantial. Furthermore, in addition to the impact of the absence of a preliminary injunction upon the daily lives of the victims of status changes, there are demonstrable direct adverse economic consequences which call for a preliminary injunction.

To do this, it is necessary to review, briefly, some essential features of missing status and determinations of death, and then to demonstrate the elements of the irreparable harm which is threatened unless a preliminary injunction is granted.

Each of the plaintiffs herein is a member of the Armed Forces of the United States who has been placed in missing status and who, thereafter, in subsequent reviews, was continued in missing status. Because of this each plaintiff is entitled, under 37 U.S.C. 552(a), "to receive or have credited to his account the same pay and allowances ... to which he was entitled at the beginning of that period, or may thereafter become entitled." This applies regardless of whether or not he had next-of-kin who became recipients of governmental benefits.

Section 552(b) provides that "Notwithstanding the death of a member while in missing status, entitlement to pay and allowances under subsection (a) of this section ends on the date--

> (1) the Secretary concerned receives evidence that the member is dead; or
>
> (2) that his death is prescribed or determined under section 555 of this title".

It is these determinations of death which are the focus of plaintiffs' complaint in this action. Clearly, under the statute, pay and allowances continue during the period that a serviceman is in missing status, regardless of whether or not he has, in fact, died and such pay and allowances end upon a determination of death.

It is indisputable that determinations of death involve adjudications of fact and result in property deprivation. McDonald v. McLucas, (S.D.N.Y., 1973) 371 F.Supp. 831, 834, aff'd 419 U.S. 987 (1974). Consequently, due process requirements apply.

In the McDonald case, the due process rights of next-of-kin of MIA's were recognized on the basis of their property interest in the pay and allowances of their respective MIA's. The present case deals with the pay and allowances of the servicemen themselves. Obviously, the property interests of the next-of-kin are strictly derivative from the rights of the MIA himself. Any interference with the MIA's rights has a direct impact upon the derivative rights of the next-of-kin.

However, the interests of the MIA and those of the next-of-kin do not coincide necessarily in all respects. Indeed, there have been numerous instances where the respective interests of the MIA and the next-of-kin were so irreconcilable that the next-of-kin have purported to "waive" the due process rights of the MIA for the purpose of obtaining a determination of the MIA's death and consequent benefits which flow therefrom to such next-of-kin.

While McDonald upheld the derivative property rights of the next-of-kin, the direct property interest of the MIA's in their own pay and allowances is far stronger.

McDonald held that 37 U.S.C. Sections 555 and 556 were unconstitutional on their face and as applied because of the absence of provision for notice and a hearing opportunity, for adversely affected persons, aimed at testing the validity of the property deprivation. 371 F.Supp. 831, 835. This is necessarily every bit as applicable to the subject MIA as it is to the next-of-kin who only has a derivative interest.

In McDonald, the defendants sought to avoid an injunction by claiming that under 37 U.S.C. 556(d), if it is later found that the subject MIA is actually still alive, they will pay back all lost pay and allowances and, hence, there will have been no property deprivation. Apart from the fact that Section 556(d) requires no such payment, and, even if it did, this is no remedy for the MIA who is alive when a determination of death, based on speculation, is made, but does not continue to survive until repatriated, the McDonald Court disposed of the issue as follows:

> "Defendants contend that the plaintiffs have not been deprived of any protected property interest because if a missing service member is actually still alive after a determination of death is made, any lost wages and allotments can be recovered under Section 556(d). This claim is without merit. It is now well settled that a temporary, nonfinal deprivation of property is nonetheless a 'deprivation' in the terms of the Fourteenth Amendment. . . . The Fourteenth Amendment draws no bright lines around three-day, 10-day or 50-day deprivations of property. Fuentes v. Shevin, 407 U.S. 67, 84-85, 86, 92 S.Ct. 1983, 1996, 32 L.Ed.2d 556 (1972)." See 371 F.Supp. 831, 834.

We submit that this holding, which was affirmed by the U.S. Supreme Court, 419 U.S. 987 (1974), is binding law which overwhelms any objections based on curing the wrong later on.

However, even if the prospect of future reimbursement under Section 556(d) were realistic and constituted an excuse for a present deprivation violating due process requirements, there are at least six (6) separate respects in which the subject MIA sustains direct, non-reimbursable, economic injury as a result of a determination of death.

1. Pay and allowances are required to continue during missing status and they cease upon a determination of death.

2. While in missing status, each serviceman is entitled to keep pay and allowances on deposit in a so-called U.S.S.D.P. account at very advantageous terms and conditions, including ten (10%) percent interest. This right is terminated by a determination of death. Furthermore, in addition to having the advantage of such an account for the profitable investment of his past earnings, the MIA loses the opportunity of placing future earnings in this account at the same beneficial terms. It will be shown during the trial that a very considerable portion of the net assets of a MIA can be the accumulation of these very high interest earnings.

3. Upon a determination of death, the assets of a MIA are distributed to others and there is no provision ensuring their recapture later if the determination is rescinded and, hence, the MIA is threatened with the loss of such assets.

4. During the trial, it will be shown that

the legal costs and disbursements needed to effectively defend a MIA against a determination of death are very substantial and if such a determination must be subsequently rescinded, and the prospect of relitigating the status review must be faced, the absence of a preliminary injunction will have increased the cost of due process by doubling the legal expenses (this is not an objection merely to paying legal expenses--it is an objection to the burden of having those expenses doubled).

5. Even if, in Section 556(d) pay and allowances lost through an erroneous determination of death can be restored, the Government cannot be required to pay interest on the withheld money and the MIA would lose that interest. U.S. v. Consumers Scrap Iron Corp., et al., 384 F.2d 62 (6th Circuit, 1967).

6. It will be shown that after a determination of death, the income to dependents of MIA's, who are the persons most naturally inclined to work for subsequent restoration of his rights, is cut to an average of about one-third (1/3) of the income

received before the determination of death. Because of this, the dependents, having been driven to the economic wall, are hindered in their ability to fight effectively for his rights and, consequently, his chances of any restoration of financial injury are diminished. See Mitchell v. W.T. Grant Co., 416 U.S. 600, 614 (1974) and Sniadach v. Family Finance Corp., 395 U.S. 337, 341-42 (1969).

Thus, no matter what can be said of Section 556(d), it is clear that, unless a preliminary injunction is granted, the MIA's who become subjects of determinations of death while this action is pending, will be threatened with direct, substantial and irreparable economic injury.

In the original Memorandum of Law which we filed on this motion, we discussed some aspects of the unconstitutionality of the challenged legislation, both on its face and as applied. We submit that we have met the burden, under Sonesta Internatl. Corp. v. Wellington Associates, 483 F.2d 247 (2nd Circuit, 1973) of showing not only sufficient serious questions going to the merits, but, indeed, probable success on those merits. There is some dispute as to what must be shown in addition. However, the most vigorous test currently proposed in this circuit would require the showing of a threat of irreparable injury. See

Mulligan, Preliminary Injunction in the Second Circuit, 43 Brooklyn Law Review, 831 (1977). By reason of the factors explained above, we submit that the plaintiffs have satisfied this aspect of the Sonesta test also, and that injunctive relief is called for. In addition, irreparable injury is threatened, as explained in the Affidavit of Dermot G. Foley, sworn to the 6th day of September, 1977, by the threatened loss of contractural rights to an accounting under the Paris Agreement.

It has been indicated that the Court may consider telescoping the present trial so as to deal not only with the preliminary injunction matter, but also with the ultimate merits of the action. As indicated above, this presents the plaintiffs with a serious difficulty because of the inordinately one-sided control by the defendants of relevant information which could be developed fairly only through appropriate discovery. We, therefore, urge the Court to grant a preliminary injunction and to defer adjudication of this action on the merits, until an opportunity for reasonable discovery has been afforded. If, however, the Court decides to bring the action to a conclusion at the end of the present trial, then plaintiffs request leave to file a post-trial brief which will address the issues with the benefit of whatever evidence can be developed at the trial itself, but without the benefit of normal and necessary discovery.

CONCLUSION

In conclusion, plaintiffs request that their motion for a preliminary injunction be granted, that the defendants' motion for dismissal be denied and that plaintiffs be afforded an opportunity to proceed with discovery prior to the ultimate trial on the issues in this action.

Respectfully submitted,

KAPLAN, KILSHEIMER & FOLEY
Attorneys for Plaintiffs

OF COUNSEL:

Dermot G. Foley, Esq.
John A. K. Bradley, Esq.

ORDER OF WEINSTEIN, J. DATED SEPTEMBER 23, 1977
APPEALED FROM

Filed
Sep 26 1977

CH:ECB:sbm
F.#772,586

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
-------------------------------------x

EARL P. HOPPER, JR., by his father and next friend, EARL P. HOPPER, SR.; et al.,

Plaintiffs,

-against-

JAMES E. CARTER, JR., President of the United States, et al.,

Defendants.
-------------------------------------x

ORDER

Civil Action No.
77 C 1793

A motion having been made by the plaintiffs for a preliminary injunction enjoining defendants and their designees pendente lite, from conducting any further proceedings or making any further determination of death under 37 U.S.C. §§ 555 and 556 with respect to American Military personnel presently designated as missing in action in Southeast Asia, and a motion having been made by the defendants to dismiss, and a hearing on the merits having been held, and the Court having considered the argument of counsel, it is hereby

ORDERED that plaintiffs' motion for a preliminary injunction is denied in all respects, and it is further

ORDERED that defendants' motion to dismiss is denied and that the defendants are directed to make a motion for summary judgment within 30 days of the entry of this order, within which time plaintiffs' may take the deposition of Roger Shields, and it is further

ORDERED that the temporary restraining order granted by this Court on September 7, 1977 and extended on September 19, 1977 shall remain in effect until 5:00 P.M.

on Tuesday, September 27, 1977.

Dated: Brooklyn, New York
September 23, 1977

s/ Jack B Weinstein

United States District Judge

OPINION, FINDINGS OF FACT AND CONCLUSIONS OF LAW DATED SEPTEMBER 28, 1977 APPEALED FROM

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

EARL P. HOPPER, JR., by his father
and next friend, EARL P. HOPPER,
SR., et al.,

Plaintiffs,

-against-

JAMES E. CARTER, JR., President
of the United States, et al.,

Defendants.

APPEARANCES:

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Attorneys for Plaintiffs
John A. K. Bradley, Esq.
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Brooklyn, New York 11201
Elaine Buck, Esq.
Assistant United States Attorney

WEINSTEIN, D.J.

This lawsuit challenges the constitutionality of sections 555 and 556 of Title 37 of the United States Code governing the circumstances under which American servicemen missing in action may be declared dead for purposes of military pay and death gratuities. Plaintiffs are servicemen who are listed in a Missing In Action status or who were listed as Missing In Action and have since been declared dead. Each is represented by a "next friend."

Following issuance of a temporary restraining order preventing hearings to decide if there should be a reclassification of additional persons from Missing In Action to Killed In Action status, plaintiffs submitted extensive documents and testimony in support of their motion for a preliminary injunction. Set out below are the court's finding of fact and law bearing on (1) whether the temporary restraining order should be continued, and (2) whether a preliminary injunction should be granted.

All Americans owe a great debt to these plaintiffs. Their next of kin and relatives and friends have suffered exquisite, almost unbearable pain, by the loss of the presence of their loved ones, and by the uncertainty about their deaths, woundings, or conditions of captivity.

Those of us who served under fire and lost comrades and friends would do all within our power to help those who are now listed as Missing In Action. This sentiment is shared by all Americans. Their brothers in service who will conduct the challenged hearings are all experienced combat veterans; there is no reason to believe that they would do less.

Based on the record thus far presented, the court concludes that defendants have shown a compassionate regard for the rights of these persons Missing In Action and those they left behind. It is apparent that the Presidential action permitting the review procedure to go forward was based partly on letters such as those of Joan Vinson and the report of the United States House of Representatives' Select Committee On Missing Persons In Southeast Asia which are in the record. They reveal the serious consequences to wives and families of carrying men as Missing In Action when the evidence is overwhelming that they are dead.

There is nothing in the record reflecting the slightest hint that the government has been less than fully sensitive to the rights and the emotional needs of those Missing In Action and of those who seek to represent them. That does not mean that at times some few parents and wives have not had documents withheld that perhaps should have been shown to them. Perhaps some documents should have been declassified earlier. Undoubtedly on rare occasions people in authority were not forthright with relatives when they should have been more understanding and open.

The court has read all of the documents plaintiffs wished it to read, including secret documents. It can only conclude that, to the extent consonant with national security, the government and these defendants have done all within their power to be fair and open. There is no indication that any legal rights or moral claims of these men who are missing in action or of their relatives have been violated.

Plaintiffs have shown no facts, based on the evidence already submitted, that would entitle them to relief. To continue the temporary restraining order would raise false hopes about chances for the ultimate success of this suit, and do a disservice to those who wish the proceedings to go forward, including the government of the United States.

Following the decisions in McDonald v. McLucas, 371 F.Supp. 831 (S.D.N.Y.), aff'd mem 419 U.S. 987, 95 S.Ct. 297 (1974), it is highly doubtful that any further action lies. It can be argued with considerable force that this suit is an attempt to circumvent the decisions in that litigation. First, it should be noted that the class in McDonald is extremely broad. Id. at p. 838. It includes as next of kin spouses, children, parents, and brothers and sisters of those Missing In Action, whether or not they were receiving benefits. Second, the Supreme Court's decision effectively affirmed the district court's ruling that only those receiving benefits have standing to challenge sections 555 and 557.

McDonald is also dispositive with respect to the form of the hearing. Although the nature of the hearing was challenged in plaintiffs' Supreme Court brief in McDonald, the Court ignored the issue in its affirmance. In effect it approved the limited form of hearing required by McDonald. Moreover, if anyone receiving benefits is adversely affected, that person can challenge the administrative determination in the Court of Claims. Crone v. United States, 538 F.2d 875 (Ct. Cl. 1976), establishes that those individuals who did receive benefits have the right to review unfavorable adjudications.

So far as those Missing In Action are concerned, and that is explicitly what this suit is about, the government has proved to the court's satisfaction, on the basis of the present record that they will not be placed in any inferior position should it be shown that they are alive. The government has been extremely generous in its handling of a person who was declared Missing or Killed In Action and subsequently was found to be alive. The court credits completely the testimony and documents in the record indicating that if any person, whether he is carried as Missing In Action or Killed In Action, should ultimately be shown to be alive, he will receive all the benefits he would have obtained had he been carried as Missing In Action. Such benefits include 10% interest on the money he would have earned during this period had it been placed in his savings account.

Moreover, the court credits testimony that, although the government has no obligation to do so, it has agreed that should any money be paid out which is now in accounts, and should the member of the armed forces return, and should there be a falling out between the person who returns and the spouse or other person who received the money and spent it, the government will replace the money. In other words, the government will pay twice. The suggestion that there will be any damage to those reclassified as Killed In Action if they return is hypothetical, of miniscule probability, and completely without merit.

The government has done things which may, perhaps, be subject to criticism by some in connection with the Vietnam war. But it has been properly generous to men Missing In Action and it has been understanding of their needs and of the needs of their families. Criticism of the government in the complaint has not been justified by the evidence. This finding is made with full appreciation of how deeply the families feel and how difficult it is to accept the possibility of death.

With respect to the claim that the government will, as a result of a reclassification from Missing In Action to Killed In Action, fail to press the Vietnamese and the other Southeast Asian nations for reports on missing servicemen, both the oral and written evidence is fully convincing that our government will make no distinction based on whether or not somebody is reclassified from Missing In Action to Killed In Action. The evidence is overwhelming that the government will continue to insist on a full accounting and that the concerned foreign governments will not make less of an accounting whatever the United States classification may be.

No substantial doubt has been cast on defendants' contention that the efforts of our government on behalf of those Missing In Action and their families will go forward without diminution of reasonable effort. Because one of the people was to leave for Southeast Asia at once on behalf of those still missing in action who could not be here, his testimony was taken by telephone.

On the basis of the record thus far made, there is no reason to continue the temporary restraining order.

It is, therefore, vacated.

There is no basis for a preliminary injunction. There has been no showing that a cause of action or claim for relief can be proven, or that there will be any irreparable harm to these plaintiffs.

The plaintiffs will be permitted, as they have requested, to take the deposition of one more witness. The United States is instructed to make a motion for summary judgment within thirty days so that this matter can be disposed of promptly at the trial level.

There are limits to what can reasonably be expected of administrative proceedings. Here the administrative remedy complies with legal requirements. That does not mean that in the past mistakes were not made. But, on the basis of the proof adduced, there appears to be no substantial doubt that there will be a legally adequate hearing.

The government is entitled to go forward with reclassification hearings.

So ordered.

Dated: Brooklyn, New York
September 28, 1977

U.S.D.J.

NOTICE OF APPEAL

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----------------------------------x

EARL P. HOPPER, JR., etc. et al., :

Plaintiffs. :

-against- :

JAMES E. CARTER, JR., etc. et al., :

Defendants. :

-----------------------------------x

77 Civ. 1793 (JBW)

NOTICE OF APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

NOTICE IS HEREBY GIVEN that the Plaintiffs, hereby appeal to the United States Court of Appeals for the Second Circuit from the Order herein dated September 23, 1977 and filed September 26, 1977, and from the opinion, findings of fact and conclusions of law herein dated September 28, 1977.

Dated: New York, New York
October 25, 1977

Dermot G. Foley

DERMOT G. FOLEY
122 East 42nd Street
New York, New York 10017
(212) 687-1980
Attorney for Plaintiffs

Of Counsel:
KAPLAN, KILSHEIMER & FOLEY
JOHN A.K. BRADLEY

TO:
HON. DAVID G. TRAGER
United States Attorney
Eastern District of New York
Attorney for Defendants

A-855

APPELLANTS' BRIEF IN OPPOSITION TO APPELLEES' MOTION TO AFFIRM IN THE SUPREME COURT OF THE UNITED STATES IN CASE ENTITLED McDONALD v. McLUCAS

IN THE

Supreme Court of the United States

October Term, 1974
No. 1929

ELLEN P. McDONALD, et al.,
Appellants,

-against-

JOHN McLUCAS, et al.,
Appellees.

On Appeal From a 3-Judge Court Sitting in the United States District Court for the Southern District of New York

APPELLANTS' BRIEF IN OPPOSITION TO APPELLEES' MOTION TO AFFIRM

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R. ALAN STOTSENBURG

(4384)

COUNSEL PRESS, INC., 55 West 42nd Street, New York, N.Y. 10036 • PE 6-8460

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 73-1929

ELLEN P. McDONALD, ET AL., APPELLANTS

v.

JOHN McLUCAS, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANTS' OPPOSITION TO APPELLEES' MOTION TO AFFIRM

STATEMENT

This brief is submitted in opposition to appellees' motion to affirm. In effect, that motion seeks dismissal of the appeal and should be denied unless it is shown that there is an absence of substantial issues which require plenary consideration. Rule 15(1)(f) and (g) of the Supreme Court Rules; Equitable Life Assurance

Society v. Brown, 187 U.S. 308, 311 (1902); Zucht v. King, 260 U.S. 174, 176 (1922).

We submit that our jurisdictional statement sets forth a series of highly substantial issues which do require such consideration. J.S. 5-8. Appellees have ignored many of these issues and have mischaracterized others in their brief supporting the motion to affirm.

ARGUMENT

1. Appellants do not merely contend that the District Court, having found hearings to be constitutionally required, was obligated to declare the challenged litigation void. (Appellees' brief page 6).Our contention is that the District Court, in fact, did find the challenged legislation unconstitutional, both on its face and as applied, and, therefore, should have declared that legislation was void. Appellees cite U.S. Department of Agriculture v. Moreno, 413 US 528 (1973), for the proposition that this Court can preserve the viability of a legislative scheme by curing the particular

constitutional defect involved. (Appellees' brief page 6). In Moreno the Court, in fact, invalidated an amendment to the Food Stamp Act which had created an unconstitutional classification excluding certain beneficiaries when that exclusion was not related to purpose of the act or to any legitimate governmental purpose. We contend that what occurred in Moreno should have occurred in the present case - namely, having found the legislation unconstitutional, the District Court should have invalidated it. In Moreno, the Court did not extend the Food Stamp Act to another class. (Appellees' brief page 6). It merely invalidated a restrictive amendment to the statute which left the beneficiary class in the expanded form in which it had existed prior to the unconstitutional amendment.

2. It is idle to speculate about the possibility that the District Court could have avoided a constitutional issue by construing the challenged legislation as requiring

notice and a hearing. (Appellees' brief page 6). The fact is that the Court expressly construed that legislation as *not* providing for a hearing. (J.S.-18; A-131). Indeed, in the earlier of the two District Court decisions in this case, Judge Metzner held the Administrative Procedure Act inapplicable to status reviews because the Missing Persons Act contained no provision for a hearing. 371 F. Supp. 837, 841. (A-44). By abandoning their appeal, the Appellees have waived any objection that they may have had to this position taken by the District Court.

3. *United States* v. *Thirty-Seven Photographs*, 402 US 363 (1971), (Appellees' brief page 6) was a pornography case which did not involve judicial legislation. There, the Court implied certain reasonable time limits to govern procedural safeguards which were expressly required under the challenged legislation. In the case now before the Court, the Missing Persons Act contains no conceivable provisions from which such an implication could

be made, and the District Court repeatedly so found. Under these circumstances, we contend that it was error to create new and previously non-existent provisions out of whole cloth. (J.S.-19). Thus, the issue of judicial legislation is clearly presented to this Court in the present appeal.

4. The District Court found that its holding of unconstitutionality because of the absence of provision for notice and hearing, rendered moot the questions raised by six other constitutional challenges set forth in plaintiffs' complaint. (A-133). Three of these charged that the challenged legislation was unconstitutional on its face and the other three that it had been unconstitutionally applied. If the District Court had held that the challenged legislation, being unconstitutional on its face and as applied, was void, then, there would be merit to the contention that these six additional constitutional issues had been rendered moot.

However, by its attempt to salvage the unconstitutional legislation and by permitting further determinations of death thereunder, the District Court authorized a continuation of proceedings which were still subject to the objections raised by the other six constitutional challenges and, thus, these were not moot. (J.S.-20-24). If the legislation survives its constitutional defects cannot be moot.

5. In dealing with these unresolved issues in their brief seeking affirmance, the Appellees refer only to the challenges which were addressed to the legislation itself and not to the manner in which it was applied. (Appellees' brief page 7). Thus, they ignore the fact that, in the District Court, they stipulated and conceded that they had been making determinations of death without recourse to any standards, criteria, or guidelines whatsoever. (A-45).

Appellees now contend that the challenged legislation does contain standards. (Appellees' brief page 8). Necessarily, then, in proceeding as they concede they did, on a case-by-case basis without standards, guide-lines or criteria, the Appellees appear now to be admitting that they failed to recognize and implement the standards which they now claim to find in the statute.

Of course, an examination of their brief will show that the provisions they seek to characterize as standards do not offer criteria which govern when and under what circumstances a determination of death will be made. (Appellees' brief page 7). They are subjective; they are vague; and they were never supplemented by anything more specific in the form of rules or regulations. (A-25,45).

6. Appellees point to those provisions in the challenged legislation requiring the Secretaries to "review" the status of a missing serviceman and to "make any determination necessary to administer" the Act. (Appellees' brief page 7). These, they claim, constitute a grant of rule-making authority on

the basis of which they are authorized to create standards and criteria governing when and under what circumstances a determination of death will be made. Clearly, this is not so. These are purely administrative directions. Significantly, no such standards were ever promulgated on the basis of this authority. (A-45). A grant of unbridled rule-making authority by language as vague as this would be a complete delegation by Congress of its legislative function.

In footnote 6 on page 7 of the brief, Appellees further contend that such rule-making authority exists by virtue of 5 U.S.C. 301. Again, on its face, this statute refers to purely administrative rule-making. It is not legislative in any sense. In U.S. v. George, 228 U.S. 14 (1913), this Court so held with respect to an earlier codification of section 301.

United States v. Shreveport Grain & Elevator Co. 287 US 77, 85, (1932) cited by Appellees, is inapposite. (Appellees' brief page 9). In that case, the challenged legislation called for the creation of rules and regulations consistant with standards set forth in section 3 of the Act. Such rules and regulations were, in fact, promulgated in that case and they were highly detailed, specific and rational. These conditions are all absent in the case of the Missing Persons Act.

American Trucking Assns. v. United States, 344 US 298 (1953), also cited by Appellees, is also inapposite. (Appellees' brief page 8). There, a broad and clear pattern of rule-making authority was granted to the Interstate Commerce Commission by the express terms of the challenged legislation. Furthermore, the rules and regulations that were promulgated were preceded by extensive hearings which emphasized the connection to the statutory scheme. Because the power of the Commission, as exercised, was "geared to and bounded by" the clearly defined limits of the regulatory system of the Act this Court distinguished A.L.A. Schecter Poultry Corp. v. United States, 295 US 495 (1934) and Panama Refining Co. v. Ryan, 293 US 388 (1934), both of which cases were relied upon by the present Appellants in the District Court and are again in this Court. 344 U.S. 298, 313. The conditions which saved the challenged legislation in the American Trucking case are absent from the Missing Persons Act.

7. Appellees appear to criticize Appellants' claim that the challenged legislation authorizes determinations of death in the absense of any evidence whatever of the fact of death. (Appellees' brief page 8). However, they do concede that, after a mere twelve-month period, the "lapse of time without information" is sufficient to establish "a reasonable presumption that a member in a missing status is dead". (Appellees' brief page 8). Simply put, that means that a determination of death can be made, under the challenged legislation, in the absense of information or evidence.

8. Appellees appear to have misconstrued our objections to the District Court's limitation of notice and hearing rights to those next-of-kin "currently receiving governmental financial benefits". (Appellees brief page 9). This was not merely an objection to denial of class certification. It will be recalled that, apart from the class action allegations of the complaint, the Appellants sued individually to protect their own rights as next-of-kin of their respective MIA's and also, in a representative capacity, as "next friend" to protect the individual rights of those MIA's. (A-4,7-8, 11-13, 14, 16, 19, 21, 26, 29).

The District Court found a constitutionally protected property interest in the continued receipt of pay and allowances by certain, but not all of the next-of-kin of the missing men. (A-130, 137, 138). Obviously, this recognized the protected property interest of those particular next-of-kin. However, it failed to recognize or protect any right of the

MIA. Thus, any next-of-kin who received a respective MIA's pay and allowances, was deemed entitled to notice and hearing regardless of whether such next-of-kin had any continuing interest in the protection of that MIA's personal rights.

Next-of-kin who, in pursuit of what they view as their best personal interest, decide to seek a determination of death, are in direct conflict with the interests of their respective MIA's who, prior to a determination of death, are still presumed to be alive and must be presumed to have a continued interest in living. These next-of-kin are afforded a right to notice and hearing. At such a hearing the interests of the MIA, as distinguished from the conflicting interests of next-of-kin who sought a determination of death, cannot be represented unless other next-of-kin were permitted to protect them. Such other next-of-kin are not only denied the right to notice and hearing under the District Court's decree but are also denied any Due Process rights under the new rules and regulations which Appellees have attached as an addendum to their brief in support of affirmance.

This conflict and its destructive impact upon the rights of individual missing men, is not the product of idle speculation. Pending the outcome of this appeal, the Department of Defense, to the personal knowledge of the author of this brief, has substantially limited determinations of death to cases where a request is made by the next-of-kin "currently receiving governmental benefits" and entitled to notice and hearing. Under the new regulations, only that next-of-kin has the right to a hearing and also the right to completely waive the hearing. Other next-of-kin, who may wish to protect the rights of the MIA and who have no conflicting interests, are without standing. Thus, the limitation of Due Process rights to next-of-kin "currently receiving governmental benefits", was error.

9. Appellees misinterpret our objections to the District Court's treatment of the class action issues. True, they do note our objection to the refusal by the District Court to certify a class composed of representatives of MIA's now threatened with a determination of death and those MIA's who have been the subject of such determinations in the past. (Appellees' brief page 9). Appellees fail to deal with the fact that the District Court decided the issue without affording counsel any hearing on the subject. (A-7, 12, 24-26, 28-30, 135, 136). Further, they have misconstrued the holding of this Court in Bailey v. Patterson, 369 U.S. 31 (1962).

In Bailey it was held that a 3-Judge Court is not required when the defense against the claim of unconstitutionality is frivolous. However, in dealing with standing to represent a class this Court united those who have been prosecuted and those threatened with prosecution and held that the representative must claim to be one or the other if he is to qualify as a representative of that class. In the present case, without a hearing, or briefs, or oral argument, or even notice to counsel that the subject was under consideration, the District Court decided that a distinction must be drawn between those MIA's who have been the subject of an unconstitutional determination of death and those who are threatened with such a determination. (A-43,136). In light of the Bailey case, the Appellees' attempt to justify this seems poorly founded indeed. Obviously, the constitutionality of the challenged legislation is the predominating issue here, regardless of whether a determination of death has occurred or is threatened.

10. Several substantial issues raised on this appeal are ignored by the Appellees in their motion to affirm, including:

a) The District Court failed to

conduct a hearing on notice as to several key issues which it decided (J.S.-3, 6, 7, 24, 25, 28, 29, 30; A-7, 12, 24-30, 135, 136);

b) The District Court made and breached an agreement with counsel to reopen issues for discovery and a hearing prior to a decision if the facts stipulated to by the parties were, without more, inadequate for the resolution of those issues (J.S.-3, 6, 12, 25, 28, 29, 30; A-7, 12, 24-25, 123-125, 135-136);

c) The Court received, entertained and admittedly was influenced by ex-parte communications without informing counsel that they had been received and after counsel had specifically warned the Court that an effort was afoot to generate such communications for the purpose of influencing the Court's decision (J.S.-3, 7, 10, 11, 15, 30, 31; A-10, 11, 30-31, 132).

There are substantial issues and we submit that Appellees' failure to deal with them is eloquent.

11. The proceedings which have been conducted under the new regulations are characterized by the following defects, among others:

a) The "hearings" are so located as to render attendance by family members, the fees for attorneys and the development and presentation of evidence, prohibitively expensive and difficult;

b) The Department of Defense case for status change is presented in documentary form and hence is not subject to cross-examination and confrontation by opposing parties;

c) There are no pre-hearing discovery procedures to facilitate preparation;

d) Next-of-kin are not informed of newly declassified material until immediately before the "hearing";

e) Information in Department of Defense possession, is disregarded by those making the adjudication, regardless of its relevance, if it is "classified";

f) Most interested persons, including frequently the parents of the subject MIA, are subject to exclusion from the "hearing";

g) There are absolutely no rules of procedure or of evidence;

h) There are no substantive standards or criteria;

i) There is no requirement that any evidence whatever exist of death nor, indeed, is there any defined burden of proof to be met.

This, we submit, is not a hearing. Green v. McElroy, 350 U.S. 473 (1959); Fuentes v. Chevin, 407 U.S. 67, 97 (1972); Bell v. Burson, 402 U.S. 535, 541, 542 (1972).

12. Appellees' suggestion that, in light of the new, inadequate regulations discussed above, this action should be remanded to District Court for relitigation, must be rejected. (Appellees' brief page 8).

There are approximately 1000 men now in missing status. In addition, some 2500, who were MIA's, have been presumptively determined to be dead. There is no evidence or information known which establishes how many of these 3500 men are living and how many are dead at this time. It is necessarily reasonable to assume that some of them may well be still alive and that the chances of their continued survival diminish as time goes on. All are presumed to be alive until a determination of death is accomplished.

Under the decree of the District Court, determinations of death are continuing, as the Appellees show in their brief. As time goes on, then, the number who remain MIA will decrease and the number who have been determined to be dead will increase.

This is significant because the North Vietnamese have adopted the position that they are not obliged, under the Paris Agreement of 1973, to account for missing men who are no longer carried as missing-in-action. Attached hereto, as an addendum, is a copy of an affidavit of Stephen R. Frank, sworn to March 13, 1974, confirming that fact. The original of this affidavit is attached to Appellants' application for a stay pending appeal filed in this

Court on May 9, 1974. Also attached as an addendum is the text of Article 8(b) of the Paris Agreement which prescribes the obligation to account.

Under these circumstances, Appellees' suggestion that the MIA families, who have been seeking their day in Court on their constitutional objections to the Missing Persons Act for over fifteen months, should be compelled to go back and begin again because of new and manifestly inadequate regulations, is insensitive and unreal. It is a suggestion that the Court engage in an exercise in avoidance when the very passage of time involved, and the determinations of death which will occur, will not only injure protected property interests, but will materially lessen the possibility of physical survival.

If the MIA's had engaged in exercises in avoidance many of them would now be home with their families. They did not, however, and as a result their families have been seeking judicial relief for over fifteen months. It would be unseemly and unjust to cause further delay by passing this case from court to court on light-weight pretexts. Thus, Richardson v. Wright, 405, U.S. 208, is not in point.

The issues presented on this appeal are substantial and time is of the essence. This Court should retain jurisdiction and consider and decide the appeal.

13. In footnote 7, pages 9 and 10 of Appellees' brief, an effort is made to justify the receipt and consideration of ex-parte communications by the District Court. Appellees' counsel assumes, as did the District Court, that there is a significant difference of opinion among MIA family members on the appropriateness of determinations of death under the challenged legislation. That assumption is founded upon misinformation

which could have been corrected with ease if the District Court had not kept the receipt of these communications, and its interest in the attitudes of family members, secret.

It will be recalled that on July 30, 1973, Appellants' counsel expressly warned the District Court that at the 1973 annual convention of MIA families, an organized effort had been initiated to recruit family members who could be persuaded to write letters to the Court. (A-37-39). This effort resulted in the receipt, by the Court of only 8 communications, at least one of which came from an individual not related to any MIA. Even if these communications were authentic, they represent the views less than 1% of the family members.

None of this became known to counsel until the District Court rendered its decision of February 13, 1974. Then, at the insistence of Appellants' counsel, the communications were made part of the District Court record and, thus, will be available upon transmission of that record to this Court.

If the District Court had any legitimate interest in what it viewed as the emotional difficulties of MIA families, it should have made that fact known and obtained authentic information. To correct the misapprehensions which arose from the course that was followed, the National League of Families of Missing and Prisoners in Southeast Asia polled its members at their 1974 annual convention. The results, as shown in a certification by E.C. Mills, executive director of the said League, attached hereto as an addendum, demonstrate that 98 1/2% of the MIA family members oppose determinations of death under the present legislation and want that legislation changed. There were only 8 negative votes.

This information could easily have been obtained for the District Court had it indicated its interest. In the absence of any such indication, Appellants' counsel, with obvious success, urged those family members who favored this litigation to refrain from communicating with the Court. (A-37-39).

Appellants' counsel, in urging such restraint, acted in reliance upon Canon 17 of the Canons of Judicial Ethics (as published by the American Bar Association) which reads:

> "17. Ex parte Communications.
> A judge should not permit private interviews, arguments or communications designed to influence his judicial action, where interests to be affected thereby are not represented before him, except in cases where provision is made by law for ex parte application.
>
> While the conditions under which briefs of argument are to be received are largely matters of local rule or practice, he should not permit the contents of such brief presented to him to be concealed from opposing counsel. Ordinarily all communications of counsel to the judge intended or calculated to influence action should be made known to opposing counsel."

If this Court now affirms the District Court, it can only mean that the Appellants relied on that Canon to their detriment.

CONCLUSION

Appellees have utterly failed to show any insubstantiality in the issues raised on this appeal. Indeed, the contrary is true. The gravity of these issues requires consideration now by this Court.

Respectfully submitted,

Dermot G Foley

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OF COUNSEL:

Kaplan, Kilsheimer & Foley
R. Alan Stotsenburg

AFFIDAVIT OF
STEPHEN R. FRANK

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I, STEPHEN R. FRANK, being sworn, say:

1. I am Director of Operations for an organization known as "Voices in Vital America", ("VIVA"), which is "dedicated to those who preserve our freedom, shall it forever endure". This organization has been actively engaged in working for the release and identification of our Prisoners of War and Missing in Action in Southeast Asia since 1970.

2. In the middle of July, 1973, VIVA sent over to Southeast Asia a delegation to ascertain the status of this nation's Missing in Action and unidentified Prisoners of War (who at that time numbered in excess of 1,300). This investigation was undertaken on behalf of the families of these Missing in Action and unidentified Prisoners of War.

3. On or about July 23, 1973, a meeting was arranged whereby the undersigned and three collegues would meet with Colonel Nguyen Do, Chief of Delegation for the Democratic Republic of Vietnam (i.e., North Vietnam) to the Four Power Joint Military Commission and the Assistant Head of that delegation at Camp Davis, Ton Son Nhut Air Force Base, Saigon, Republic of Vietnam. Colonel Do is the chief representative of North Vietnam responsible for any accounting relating to the 1,300+ Americans still listed as Missing in Action or unidentified Prisoners of War.

4. During said meeting on July 23, 1973, Colonel Do was asked as to certain individuals comprising the 1,300+ list. He stated, "We do not know why you are here because your government

considers all these men dead." At said meeting, he impressed upon the undersigned the fact that his government felt it was inappropriate for any Americans to discuss with the North Vietnamese anything dealing with Americans who had already been classified as dead by the United States of America.

5. In subsequent conversations with knowledgeable people in Saigon, it was reiterated many times that the position of the government of North Vietnam is that they will not discuss any of the 1,300+ Americans who are still Missing in Action and unidentified Prisoners of War who are considered to be dead by the government of the United States of America.

6. On Friday evening, October 26, 1973, I related the above conversation to Dermot Foley, Esquire.

Dated: March 13, 1974

Steph R. Frank
STEPHEN R. FRANK

On March 13, 1974, before me, the undersigned, a Notary Public in and for said State, personally appeared STEPHEN R. FRANK, known to me to be the person whose name is subscribed to the within instrument and acknowledged that he executed the same.

WITNESS my hand and official seal.

Sidney A. Adair

S. A. ADAIR

9401 Wilshire Blvd., Beverly Hills, CA. 90212

Text of Article 8(b), Paris Agreement.

"The parties shall help each other to get information about those military personnel and foreign civilians of the parties missing in action, to determine the location and take care of the graves of the dead so as to facilitate the exhumation and repatriation of the remains, and to take any such other measures as may be required to get information about those still considered missing in action." (Emphasis supplied)

CERTIFICATION

As Executive Director of the National League of Families of Prisoners and Missing in Southeast Asia, the only national organization of POW and MIA families, I have examined the records of our organization and I certify that:

1. On June 28 through July 1, 1974, our organization held its Annual meeting at Omaha, Nebraska;

2. 506 of our members who are POW/MIA family members attended;

3. On June 30, 1974, with virtually all attendees present, the following resolution was presented for a vote:

> "It is the strong sense of the family members at the 5th Annual Meeting that status changes of MIA's by way of presumptive findings of death must cease until accounting procedures have been proven to be exhausted and a satisfactory new law which will completely protect the rights and individual liberties of each

POW and MIA has been enacted to replace sections 555 and 556 of Chapter 10, Title 37, U.S. Code."

4. The vote was unanimously affirmative with the exception of 8 negative votes and there were no abstentions.

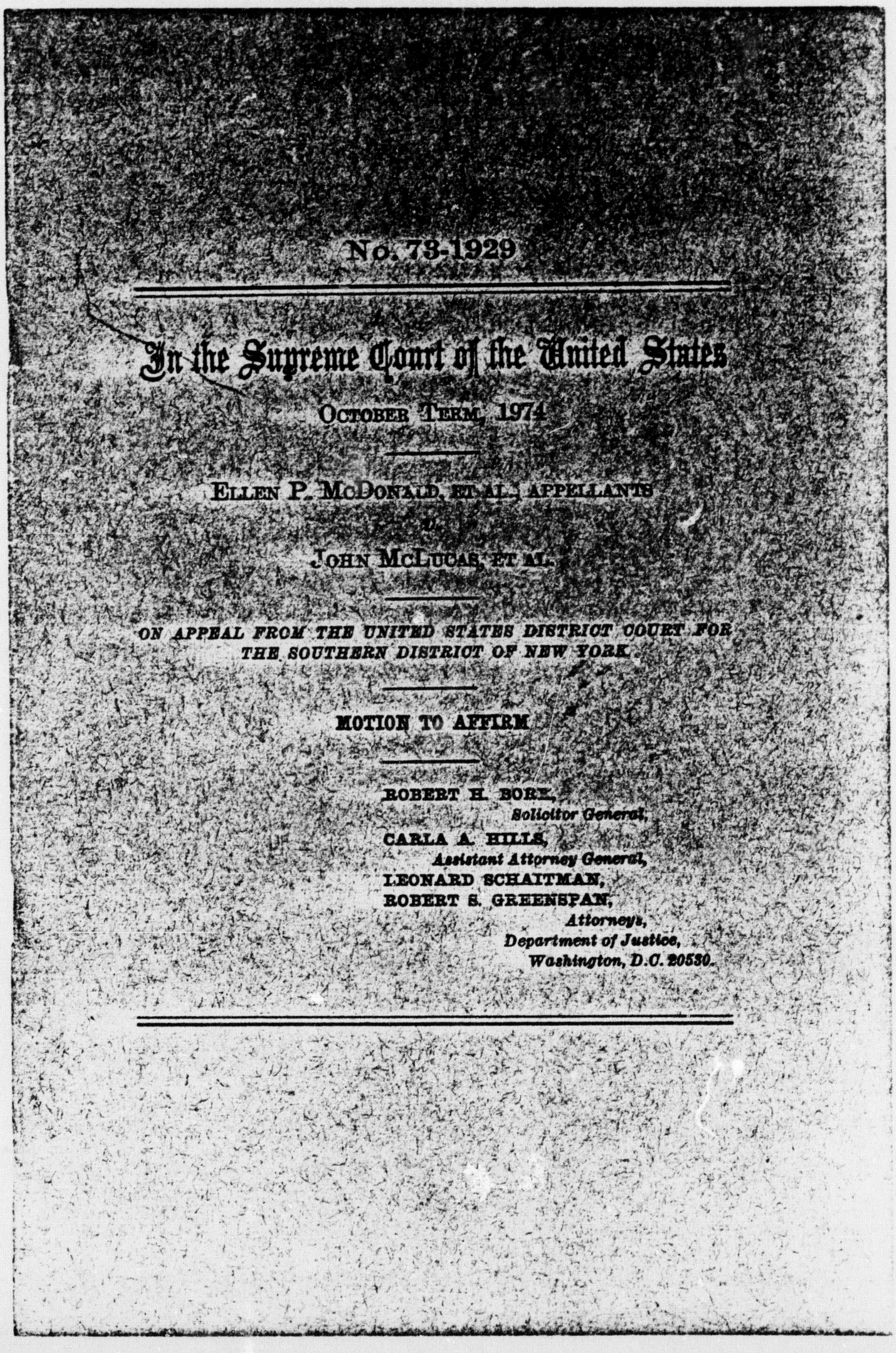
E.C. MILLS
Executive Director
National League of
Prisoners and Missing
in Southeast Asia.

Sworn to before me this
, day of October,
1974.

Notary Public

A-889

APPELLEES' MOTION TO AFFIRM IN THE SUPREME COURT OF THE UNITED STATES IN CASE ENTITLED McDONALD v. McLUCAS



No. 73-1929

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OCTOBER TERM, 1974

ELLEN P. McDONALD, ET AL., APPELLANTS
v.
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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO AFFIRM

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In the Supreme Court of the United States

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO AFFIRM

Pursuant to Rule 16 of the Rules of this Court, appellees move to affirm the judgment of the district court.

STATUTES INVOLVED

37 U.S.C. 555 provides in pertinent part:

> *Secretarial review*
>
> (a) When a member of a uniformed service entitled to pay and allowances under section 552 of this title has been in a missing status, and the official report of his death or of the circumstances of his absence has not been received by the Secretary concerned, he shall, before the end of a 12-month period in that status, have the case fully reviewed. After that

review and the end of the 12-month period in a missing status, or after a later review which shall be made when warranted by information received or other circumstances, the Secretary concerned, or his designee, may—

(1) if the member can reasonably be presumed to be living, direct a continuance of his missing status; or

(2) make a finding of death.

(b) When a finding of death is made under subsection (a) of this section, it shall include the date death is presumed to have occurred for the purpose of—

(1) ending the crediting of pay and allowances;

(2) settlement of accounts; and

(3) payment of death gratuities.

That date is—

(A) the day after the day on which the 12-month period in a missing status ends; or

(B) if the missing status has been continued under subsection (a) of this section, the day determined by the Secretary concerned, or his designee.

* * * * *

37 U.S.C. 556 provides in pertinent part:

Secretarial determinations

(a) The Secretary concerned, or his designee, may make any determination necessary to administer this chapter and, when so made, it is conclusive as to—

(1) death or finding of death;

(2) the fact of dependency under this chapter;

(3) the fact of dependency for the purpose of paying six months' death gratuities authorized by law;

(4) the fact of dependency under any other law authorizing the payment of pay, allowances, or other emoluments to enlisted members of the armed forces, when the payments are contingent on dependency;

(5) any other status covered by this chapter;

(6) an essential date, including one on which evidence or information is received by the Secretary concerned; and

(7) whether information received concerning a member of a uniformed service is to be construed and acted on as an official report of death.

(b) When the Secretary concerned receives information that he considers establishes conclusively the death of a member of a uniformed service, he shall, notwithstanding any earlier action relating to death or other status of the member, act on it as an official report of death. After the end of the 12-month period in a missing status prescribed by section 555 of this title, the Secretary concerned, or his designee, shall, when he considers that the information received, or a lapse of time without information, establishes a reasonable presumption that a member in a missing status is dead, make a finding of death.

* * * * *

STATEMENT

This is a direct appeal from a decision of a three-judge district court holding that certain federal statutes, which authorize the Secretaries of the various armed services to determine whether a missing serviceman is dead, are unconstitutional insofar as they do not afford the serviceman's next of kin an administrative hearing in connection with a death determination. Following the district court's decision, the Secretaries of the various armed services issued regulations implementing the district court decree. Although we do not believe that administrative hearings are constitutionally required, such hearings are now being provided under the newly-issued regulations. Accordingly, the government has decided not to appeal from the district court decision.[1] This appeal, therefore, involves a challenge by plaintiffs below who are dissatisfied with various aspects of the district court's ruling.

The "Payments to Missing Persons Act", 37 U.S.C. 551, *et seq.*, authorizes the continuance of salaries and other benefits to dependents of missing servicemen. 37 U.S.C. 555 and 556 provide that the Secretary of the military service involved may conclude, after a review of the missing person's status, that the serviceman should be continued as "missing" or declared dead. If a determination of death is made pursuant to a status review, the serviceman's salary is terminated, and death gratuities are awarded. While the statutes are silent as to the right of the serviceman's next of kin to participate in the status review, it had been the military's practice, until the district court's decision, to conduct such proceedings on an *ex parte* basis, without affording next of kin an opportunity to be heard.[2]

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[1] The government withdrew its notice of appeal to the Court on July 29, 1974.

Appellants, five persons who were the next of kin of servicemen in a missing status, brought this class action on behalf of themselves and all next of kin of servicemen who were in a missing status on or after January 1, 1962 (A. 7). Appellants sought a declaration that 37 U.S.C. 555 and 556 violated the Fifth Amendment to the Constitution because those statutes, *inter alia,* did not afford them an opportunity to be heard at status review proceedings (A. 20, 21). As relief, they sought an injunction restraining the appellees, the Secretaries of the various military services, from making further determinations of death pursuant to the challenged statutes, and damages for losses sustained by members of the class (A. 30-31).

A three-judge court, convened pursuant to 28 U.S.C. 2282 and 2284, ruled that Sections 555 and 556 are unconstitutional, insofar as they failed to provide next of kin with a hearing, and restrained the appellees from making further determination of death unless:

> the next-of-kin of a serviceman carried as missing in action and currently receiving governmental financial benefits which could be terminated by a status review are given notice of a status review and afforded a reasonable opportunity to attend a hearing, with a lawyer if

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[2] The respective services did, however, informally communicate with next of kin in connection with status determinations made under the statutes (A. 131).

> they so chose, and are given reasonable access to the information upon which the status review will be based and are permitted to present any information which they consider relevant to the proceeding * * * (A. 137).[3]

As noted above, the Secretaries of the military services subsequently promulgated regulations to implement the district court's order.[4]

ARGUMENT

1. Appellants contend that the district court, having found hearings to be constitutionally required, was obligated to declare 37 U.S.C. 555 and 556 void (J.S. 17). This contention is without merit.

This Court has frequently preserved the viability of a legislative scheme by curing the particular constitutional defect involved. See, *e.g., U.S. Department of Agriculture* v. *Moreno,* 413 U.S. 528 (extending Food Stamp Act to another class). Indeed, under this Court's decisions, the district court could have avoided the constitutional issue by construing the statute to require hearings for next of kin. See, *e.g., United States* v. *Thirty-Seven Photographs,* 402 U.S. 363, 369.

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[3] In support of its ruling that relief would be granted prospectively only, *i.e.*, to those next of kin representing servicemen who were still in a missing status, the court noted that none of the named plaintiffs represented servicemen who had previously been declared dead under the statute in issue (A. 129).

[4] The regulations promulgated by the respective Secretaries are substantially alike, and provide, *inter alia*, for a hearing to be conducted by a hearing officer if the next of kin requests it. Next of kin are afforded the right to attend, with counsel, and to submit evidence for consideration at the hearing, and to examine the evidence in the possession of the military, except classified material. Those regulations are reprinted at pp. 1A–11A in the Appendix to this motion.

Assuming that hearings are constitutionally required, the district court properly ordered that hearings be held rather than declare the statute void and thereby deprive the services of authority officially to determine whether men under their command are no longer alive.[5]

2. Appellants' further contentions concerning the Act are without merit:

(a) The Act requires that the Secretaries of the various services "shall review" the status of missing servicemen (Section 555(a)), and Congress further provided that in carrying out this statutory duty, the Secretaries "may make any determination necessary to administer" the Act (Section 556(a)). These provisions demonstrate that Congress intended that the Secretaries exercise the authority to issue regulations implementing the statutory mandate.[6] See, *e.g.*,

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[5] Appellants apparently assume that a declaration of invalidity as to Sections 555 and 556 would not affect other provisions of the Act. It is not clear, however, that Congress intended that payments to those servicemen in a missing status or their next of kin be continued in the absence of a mechanism for status determinations. The Act does not contain a severability clause, and the provisions of Section 552(b)(2) expressly provide for continuation of payments until a determination is made under Section 555. Thus, if appellant's contention were accepted, it would, in our view, result in the invalidation of the entire Act.

[6] In addition, 5 U.S.C. 301 provides in relevant part that "[t]he head of * * * [a] military department may prescribe regulations for the * * * distribution and performance of [the department's] business * * *." Since the various military departments are charged with making status determinations under the Missing Persons Act, the Secretaries are authorized by 5 U.S.C. 301 to promulgate regulations prescribing procedural requirements applicable to such determinations.

American Trucking Assns. v. *United States,* 344 U.S. 298. Thus, contrary to appellant's assertion (J.S. 21), the Secretaries possess statutory authority to promulgate regulations according hearings to next of kin of servicemen in a missing status.

(b) Appellants also argue that the statutes do not contain sufficient standards to guide the Secretaries in making determinations of death (J.S. 22). In particular, appellants claim that the statutes permit determinations to be made in the absence of any evidence (J.S. 23).

We note first that these contentions are prematurely made since questions as to the evidentiary requirements applicable to status determination should await the application of the recently-issued regulations in a concrete case. See, *e.g., Richardson* v. *Wright,* 405 U.S. 208. In any event, Sections 555 and 556 contain sufficient standards which expressly refute the argument that determinations may be made in the absence of any evidence. Thus, the Secretaries are prohibited from making determinations of death unless (1) there is "information" which "establishes conclusively" the death of a serviceman (Section 556 (b)), or (2) after the end of a 12-month period in a missing status, the "information received" or "a lapse of time without information" is sufficient to establish "a reasonable presumption that a member in a missing status is dead" (*ibid.*). These legislative standards are more than sufficient to define the limits of the Secretaries' discretion in making death determinations, and thus fully comport with constitutional requirements. See *United States* v. *Shreveport Grain & Elevator Co.,* 287 U.S. 77, 85.

3. Finally, appellants maintain (J.S. 7) that the district court erred in affording relief only to that class of persons representing "next of kin 'currently receiving governmental financial benefits'" which could be terminated by a status review. Appellants argue that, in addition to ordering pretermination hearings to persons currently receiving benefits, the district court should have considered the rights of claimants whose benefits have previously been terminated pursuant to a determination of death, including their alleged right to damages. However, as the district court noted (A. 129), none of the individual appellants "are proper representatives of the group of military personnel who have previously been declared dead" since all of them sue on behalf of servicemen still in a "missing" status. In the absence of a proper representative of the proposed class, the district court properly declined to certify a class (see *Bailey* v. *Patterson,* 369 U.S. 31, 32–33), particularly since disposition of the rights of persons representing servicemen previously declared dead presents quite different issues.[7]

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[7] The district court also properly declined to certify a class consisting of those persons properly represented by appellants, since the government could be expected to fully comply with the court's order (A. 129–130). As noted earlier, the government has promulgated regulations affording all such claimants a pretermination hearing. Contrary to appellants' contention (J.S. 28–29), the district court was not required to hold a hearing pursuant to Rule 23, Fed. R. Civ. P., before denying class certification. Rule 23 requires only that the court determine by

CONCLUSION

For the foregoing reasons, it is respectfully submitted the judgment of the district court should be affirmed.

Robert H. Bork,
Solicitor General.
Carla A. Hills,
Assistant Attorney General.
Leonard Schaitman,
Robert S. Greenspan,
Attorneys.

October 1974.

"order" whether a class action is properly maintainable. Moreover, as shown above, the court acted well within its discretion in declining relief here.

Appellants also challenge (J.S. 29–30) that portion of the district court's order limiting hearings to next of kin who demand them after notice. However, it is entirely reasonable to dispense with a hearing if none is desired by the interested party. Appellants also object to the fact that the district court's opinion adverts to letters to the court which, as the court stated (A. 132), reflected the "anguish" of families of servicemen in a missing status. But, quite apart from the fact that appellants, who have received all of the relief to which they are entitled, sustained no prejudice from these communications, the court's reference to the letters was merely intended to illustrate the self-evident fact that the emotionally charged issues involved in this case give rise to the conflicting attitudes among the affected persons.

APPENDIX

DEPARTMENT OF THE NAVY,
OFFICE OF THE SECRETARY,
Washington, D.C. 20350.

Department of the Navy Regulations for Holding Hearings Whenever a Status Change is Considered Pursuant to the Payment to Missing Persons Act (37 U.S.C. §§ 551, et seq.).

1. *Background.* Pursuant to sections 555, 556, title 37, *United States Code,* the Secretary of the Navy or his designee is required, or may elect, to review the cases of those service members who have been carried in a missing status. In the case of *McDonald* v. *McLucas,* Civil No. 73 Civ. 3190 (S.D. N.Y. Feb. 14, 1974), a Federal court ordered a hearing and certain constitutional due-process safeguards as a prerequisite to any status changes. This directive implements the court decision.

2. *Status Review.* The review of the status of a service member of either the Navy or the Marine Corps will be conducted in the following manner:

(a) Each next- of-kin of each missing service member currently receiving governmental financial benefits which could be terminated by a status review will be notified whenever the status of the member will be reviewed and a status change is being actively considered.

(b) The next-of-kin entitled to notice of the status review will be notified of their right to attend a review hearing prior to the status review. Notification of the pending review, and of the right to attend a hearing prior to that review, will be made to the next-of-kin entitled to notice via certified mail, return receipt requested. The next-of-kin notified will be afforded 21 days from receipt of notification in which to respond whether they wish to elect any of the rights afforded. If, after 21 days, no response has been received, it will be presumed that the next-of-kin have elected not to exercise the rights afforded. If, however, the return receipt indicates that the next-of-kin never actually received notification, a reasonable attempt shall be made by letter or by other means to notify the next-of-kin, and the 21-day period shall begin only upon actual notification or when reasonable attempts to locate the next of kin have been terminated.

(c) Notification to the next-of-kin will indicate a scheduled date for the hearing, not earlier than 21 days after receipt of such notification, unless next-of-kin specifically agree to an earlier date. If the next-of-kin indicate this date is inconvenient, then the hearing may be rescheduled for a date within 10 days of the original scheduled date which is satisfactory to both the Navy or the Marine Corps and the next-of-kin. Upon written request by the notified next-of-kin, a reasonable delay in the hearing may be granted when it can be demonstrated that such delay would be meaningful to the status review or that such a delay would be essential in affording the next-of-kin the opportunity to exercise their rights. A request for delay must be in writing and it must be made to the office making the notification.

(d) The next-of-kin may attend the hearing with privately retained counsel if they choose.

(e) The next-of-kin entitled to notice will be afforded reasonable access to all information upon which the status review will be based. This information shall be compiled in a file which will be available for inspection by the next-of-kin, and counsel, at the appropriate Service Headquarters, Navy Department, Washington, D.C., during normal working hours on days prior to the scheduled hearing. Upon request, it may be reproduced and forwarded to next-of-kin upon payment of standard fees for this service.

(f) The next-of-kin entitled to notice will be afforded the opportunity before and during the hearing to present information which they consider relevant to the status review proceedings.

(g) The next-of-kin entitled to notice may exercise any or all of the rights afforded them. For example, the next-of-kin may waive their right to attend the review hearing alone, or by counsel, and still submit written information considered relevant to the status review proceedings prior to the scheduled hearing date.

(h) Hearings will be conducted at the offices of the appropriate Service Headquarters, Navy Department, Washington, D.C. Costs incurred by the next-of-kin are not reimbursable by the Government.

(i) Hearings shall be conducted by a single hearing officer, appointed for that purpose.

(j) Comments or objections by the next-of-kin or their counsel to the information before the hearing officer, or to the hearing proceedings, shall be noted by the hearing officer.

(k) The hearing shall be closed to the public and limited in attendance to only those next-of-kin and their attorneys who have been afforded and elected the right of attendance. The hearing will be non-adversarial in nature and need not be recorded verbatim. The hearing may be tape-recorded, however, at the request of the next-of-kin. The agenda will be set by the hearing officer. Strict rules of evidence will not apply.

(l) The hearing officer, after his collection of information from Government records and from the next-of-kin, will forward this material to the review board. He shall include his opinion as to whether the missing service member is alive or dead, and his recommendation whether or not a status change should be made.

(m) Next-of-kin entitled to notice will be furnished, a brief statement of the facts upon which a status change was based.

(n) Next-of-kin entitled to notice who elect to waive any or all of their rights in connection with a hearing, but who prior to the hearing, decide to exercise any or all of them, shall be afforded the opportunity to exercise those rights.

26 March 1974.

Approved.

J. William Middendorf II,
J. WILLIAM MIDDENDORF II,
Acting Secretary of the Navy.

A-906

5A

Change No. 2

HEADQUARTERS
DEPARTMENT OF THE ARMY
Washington, DC, *27 May 1974*

PERSONNEL—GENERAL

THE ARMY CASUALTY SYSTEM

This change adds regulatory authority to conduct reviews of missing service members by HQDA.

AR 600-10, 29 March 1972, is changed as follows:

1. Material which has been added or changed is indicated by a star.
2. Add new pages 8-5 through 8-7.
3. File this change sheet in front of the publication for reference purposes.

The proponent agency of this regulation is The Adjutant General's Office. Users are invited to send comments and suggested improvements on DA Form 2028 (Recommended Changes to Publications and Blank Forms) direct to HQDA (DAAG-PSC) Alexandria, VA 22332.

By Order of the Secretary of the Army:

CREIGHTON W. ABRAMS
General, United States Army
Chief of Staff

Official:
VERNE L. BOWERS
Major General, United States Army
The Adjutant General

DISTRIBUTION:

Active Army, ARNG, USAR: To be distributed in accordance with DA Form 12-9A requirements for AR, Personnel General—A (Qty Rqr Block No. 382).

TAGO 584A—May 540-475—74

★Section III. STATUS REVIEW BY HQDA

8-12. Reason for status review. Pursuant to chapter 10, Title 37, United States Code, the Secretary of the Army or his designee may elect to review the case of those service members who have been carried in a missing status. This review may be accomplished for the following reasons:

a. The passage of time without any information which could relate to the likelihood of the member's return to military control:

b. The unavailability of any information from intelligence sources regarding the status of the service member;

c. The return to military control of other PW/MIA personnel and the lack of knowledge on their part of any information relating to the status of the missing member:

d. The remains of the missing personnel are recovered and positively identified; and

e. Such other circumstances as the Secretary of the Army or his designee deem to warrant a review.

8-13. Conduct of the review. The review of the status of the service member will be conducted in the following manner:

a. The NOK currently receiving governmental financial benefits which could be terminated by a status review will be notified that the status of the member will be reviewed. (In the event there are no next of kin eligible for notice of the pending review, the Secretary of the Army may afford the same rights to the PNOK (as defined in para 1-5*b*(3)) as though the PNOK were entitled to notice.)

b. NOK entitled to notice will be afforded the opportunity to attend a hearing, with or without a privately retained lawyer, in conjunction with this review.

c. NOK entitled to notice will be afforded reasonable access to the information upon which the status review will be based. Documents classified under the criteria specified in DOD 5200.1-R and AR 380-5 will not be made available to the NOK or to the Hearing Officer. However, every effort will be made to either downgrade the information which is classified or to present it in such a manner as to warrant removal of protective markings. (This may be accomplished by removing that portion of the information which caused it to be classified, such as the [illegible] of loss of the service member, the type [illegible] which he was involved, the source or collection means of the intelligence data, etc., or by unclassified summary.) In the event classified information cannot be downgraded or presented as aforementioned, the classified information will not be made available to the Hearing Officer and may not be considered in the course of the review. Assistance will be provided by the Assistant Chief of Staff for Intelligence, DA, to insure that security procedures and data are not compromised.

d. NOK entitled to notice will be afforded the opportunity before and during the hearing to present information which they consider relevant to the proceedings. NOK entitled to notice will be furnished, upon their written request, a brief statement of the facts upon which the status review will be based.

e. NOK entitled to notice may elect to exercise any or all of the rights set forth above. Notification of the pending review will be made to the NOK entitled to notice via a registered return receipt requested mail. A reply to this notification indicating the desires of the NOK will be made to the notifying office (fig 8-1). The NOK notified will be afforded 21 days from the receipt of notification in which to make an election of the above rights. If no response is received, it will be presumed that the notified NOK have elected not to exercise the rights provided. NOK who are notified will be furnished pre-addressed indicia envelopes for the purpose of acknowledging the notification of review and electing or waiving applicable rights.

f. If notified NOK elect to attend a hearing, with or without a privately retained lawyer, a hearing date will be established and the NOK making the election will be informed. Upon written request by notified NOK, a delay in the review may be granted when it can be demonstrated that such a delay would be meaningful to the review or that such a delay would be essential in affording the NOK the opportunity to exercise their rights. A request for delay must be in writing and it must be made to the office conducting the notification. The Adjutant General will appoint a Hearing Officer who shall be a commissioned officer in the grade of 0-4 or above. The hearing will be closed to the public and limited in attendance to only those NOK and their attorneys who have been afforded and elected the right of attendance, and will be nonadversarial in nature. A mechanical recording of the hearing will be prepared but will be transcribed only upon request of and at the expense of the requesting party. However, a summarized record of the hearing will be prepared in every case. The hearing agenda will be set by the Hearing Officer. Neither AR 15-6 nor strict rules of evidence apply. The inquiry will be confined to matters of official record and such evidence, to include testimony of witnesses, as the attending NOK may present. The Hearing Officer will insure that attendees are given the opportunity to review the information from official records to be considered in the hearing, that NOK attending are permitted to submit relevant information, and that NOK attending are informed of the final recommendation of the Hearing Officer and the reasons therefor. If requested by the Hearing Officer, The Judge Advocate General will provide an attorney to be present for the hearing to provide legal advice to the Hearing Officer. If requested by the Hearing Officer, the Commanding Officer, USA Memorial Affairs Agency will provide a representative who is skilled in the forensic sciences and the identification processes used within that organization.

g. NOK who have attended the hearing will be furnished, upon their request, a complete copy of the summarized record of the hearing together with the recommendation and supporting reasons to be furnished to The Adjutant General.

h. If NOK who have attended the hearing or their privately retained lawyer objects to the recommendations of the Hearing Officer, their objections to the recommendations of the Hearing Officer will be incorporated in the file sent forward to The Adjutant General. These objections must be presented to the Hearing Officer within 10 calendar days following the date the attending NOK are informed of the Hearing Officer's recommendations so that a decision by The Adjutant General is not unnecessarily delayed. An extension of this time may be granted by the Hearing Officer for good cause shown.

i. The Hearing Officer will submit the summarized record of the hearing, together with his recommendations and supporting reasons and the NOK objections, if any, to The Adjutant General of the Army who will render a decision as designee of the Secretary of the Army as to the status of the missing service member.

8–14. Costs incurred by the attending NOK. Cost incurred by the attending NOK to include travel, lodging, local transportation, legal fees, transcription costs, witness expenses, and other expenses will be borne by the attending NOK and will not be reimbursed by the Government.

ELECTION OF RIGHTS
AFFORDED BY THE SECRETARY OF THE ARMY
IN CONNECTION WITH HIS REVIEW OF THE CASE OF

____
NAME SSN

Please check and initial all applicable statements

☐ ________ (I, We) have read and understand the rights which (I, We) have been afforded as stated in the letter with which this form is inclosed.

☐ ________ (I, We) further acknowledge notice of the pending review of the case of the serviceman named above, who is (my, our) ______________.

☐ ________ (I, We) do hereby elect to waive all of the rights afforded (me, us) in connection with the pending review of the status of (my, our) ______________.

(I, We) Desire:

☐ ________ a. To be furnished a brief statement of the facts upon which the status review will be based.

☐ ________ b. To attend the hearing.

☐ ________ c. To attend the hearing with a privately retained lawyer.

☐ ________ d. To have reasonable access to the information from official records upon which status review will be based.

☐ ________ e. To have the opportunity to present any information which is considered relevant to the proceeding.

SIGNATURE(S)	RELATIONSHIP TO SERVICEMAN NAMED ABOVE	DATE

Mail completed form to:

HQDA (DAAG-PSC-P)
200 Stovall Street
Alexandria, Virginia 22332

Figure 8-1

DEPARTMENT OF THE AIR FORCE
Headquarters US Air Force
Washington DC 20330

AF REGULATION 35-43

22 April 1974

Military Personnel

Status Determination Changes for Missing in Action (MIA) Personnel

This regulation establishes procedures for continuance of a missing in action (MIA) status or for making changes by a finding of death or issuance of a report of death. It implements chapter 10, Title 37, United State Code.

1. Law Governing Status Reviews. Chapter 10, Title 37, United States Code, specifically authorizes continuance of a missing in action status or change in such status by a finding of death (Section 555) or issuance of an official report of death (Section 556):

§555. Secretarial review

(a) When a member of a uniformed service entitled to pay and allowances under section 552 of this title has been in a missing status, and the official report of his death or of the circumstances of his absence has not been received by the Secretary concerned, he shall, before the end of a 12-month period in that status, have the case fully reviewed. After that review and the end of the 12-month period in a missing status, or after a later review which shall be made when warranted by information received or other circumstances, the Secretary concerned, or his designee, may—

(1) if the member can reasonably be presumed to be living, direct a continuance of his missing status; or

(2) make a finding of death.

(b) When a finding of death is made under subsection (a) of this section, it shall include the date death is presumed to have occurred for the purpose of—

(1) ending the crediting of pay and allowances;

(2) settlement of accounts; and

(3) payment of death gratuities.

That date is—

(A) the date after the day on which the 12-month period in a missing status ends; or

(B) if the missing status has been continued under subsection (a) of this section, the day determined by the Secretary concerned, or his designee.

(c) For the sole purpose of determining status under this section, a dependent of a member on active duty is treated as if he were a member. Any determination made by the Secretary concerned, or his designee, under this section is conclusive on all other departments and agencies of the United States. The subsection does not entitle a dependent to pay, allowances, or other compensation to which he is not otherwise entitled. Added Pub. L. 89-554, 5(b), Sept. 6, 1966, 80 Stat. 628

§556. Secretarial determinations

(a) The Secretary concerned, or his designee, may make any determination necessary to administer this chapter and, when so made, it is conclusive as to—

(1) death or finding of death;

(2) the fact of dependency under this chapter;

(3) the fact of dependency for the purpose of paying 6 months' death gratuities authorized by law;

(4) the fact of dependency under any other law authorizing the payment of pay, allowances, or other emoluments to enlisted members of the armed forces, when the payments are contingent on dependency;

(5) any other status covered by this chapter;

(6) an essential date, including one on which evidence or information is received by the Secretary concerned; and

(7) whether information received concerning a member of a uniformed service is to be construed and acted on as an official report of death.

(b) When the Secretary concerned receives information that he considers establishes conclusively the death of a member of a uniformed service, he shall, notwithstanding any earlier action relating to death or other status of the member, act on it as an official report of death. After the end of the 12-month period in a missing status prescribed by section 555 of this title, the Secretary concerned, or his designee, shall, when he considers that the information received, or a lapse of time without information, establishes a reasonable presumption that a member in a missing status is dead, make a finding of death.

* * * * *

(d) The Secretary concerned, or his designee, may, when warranted by the circumstances, reconsider a determination made under this chapter, and change or modify it.

* * * *

(h) For the sole purpose of determining status under this section, a dependent of a member of a uniformed service on active duty is treated as if he were a member. Any determination made by the Secretary concerned, or his designee, under this section is conclusive on all other departments and agencies of the United States. This subsection does not entitle a dependent to pay, allowances, or other compensation to which he is not otherwise entitled. Added Pub. L. 89-554, 5(b), Sept 6, 1966, 80 Stat. 629.

2. Reviewing Officers. Review hearings to consider cases under Sections 555 and 556, Title 37, U.S.C., shall be made by one or more officers appointed by the Secretary or his designee as circumstances require.

3. Notification to Next of Kin. Next of Kin (NOK) of a MIA member currently receiving governmental financial benefits which could be terminated by a status review will be notified that:

OPR: DPMSC

DISTRIBUTION: X (Stocked and issued, AFMPC/DPMSC, Randolph AFB TX 78148).

a. The status of the MIA member is to be reviewed on a certain date;

b. They will be afforded a reasonable opportunity to attend the review hearing with a privately retained civilian attorney if they choose;

c. They will have reasonable access to information upon which the status review will be based; and

d. They will be permitted to present any information which they consider relevant to the proceedings.

4. Waiver Provisions. NOK may waive their right to attend the review hearing and still submit written matters on their behalf. Failure without good cause to exercise by the time prescribed, any of the rights extended under this regulation will be construed as a waiver of such rights, in which event the review will proceed as if such rights had been expressly waived.

5. Policy on Classified Material. Classified material will not be disclosed or made available to NOK, nor will it be considered by the review hearing officer or the Secretary of the Air Force, or his designee, in making a status change. However, every effort will be made to declassify such material so that as much of it as possible can be made known and available to NOK and considered in the status review process.

6. Conduct Review of Hearings. Review hearing proceedings will be informal and closed to the public. They are not adversary proceedings. Strict rules of evidence do not apply. While NOK will be permitted to call witnesses, they are encouraged to use written statements to expedite proceedings. The only limitation as to matters which may be considered shall be one of relevancy and materiality as to whether the member should continue to be carried MIA, or whether a report of death or finding of death should be issued.

7. Report of Review Hearings. The officer (or officers) appointed to conduct the review hearing will objectively review the information upon which the status review will be based including information and argument offered by NOK, and make recommendations to the Secretary of the Air Force or his designee concerning the status of Air Force members falling within the scope of chapter 10, Title 37, USC. A summarized report of the review will be submitted to NOK for comment prior to submission to the Secretary or his designee for final decision. If NOK disagrees with the accuracy of the summary, the disagreement will be resolved by comparing the summary to a mechanical (or other verbatim) recording of the hearing. The recording will prevail over the recollection of the parties to the hearing. The Secretary or his designee will notify NOK of his decision.

8. Costs Incurred. Costs incurred by NOK as a result of any aspect of this program are not reimbursable by the Government.

BY ORDER OF THE SECRETARY OF THE AIR FORCE

OFFICIAL

GEORGE S. BROWN, General, USAF
Chief of Staff

JACK R. BENSON, Colonel, USAF
Director of Administration

U.S. GOVERNMENT PRINTING OFFICE : 1974—O-558-993

AFFIDAVIT OF RUSSELL DAVIS, JR.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

---------------------------------------x

EARL P. HOPPER, JR., etc., et al., : 77 Civ. 1793

Plaintiffs, :

-against- : AFFIDAVIT OF RUSSELL DAVIS, JR.

JAMES E. CARTER, etc., et al., :

Defendants. :

---------------------------------------x

STATE OF CALIFORNIA)
: SS.:
COUNTY OF)

RUSSELL DAVIS, JR., being duly sworn, deposes and says:

1. I am the father of BRENT E. DAVIS, a missing-in-action serviceman who is a plaintiff in this litigation.

2. My son has been missing-in-action in Southeast Asia for some years and, consequently, is unable to appear and represent himself in this action. Therefore, I appear for him, as his next friend, to protect his interests.

3. My son was married. He and his wife have no children. However, some years ago, while my son was in missing status but had not been declared dead in any State or Federal proceeding, his wife chose to remarry. I state this as a fact without any intention to comment, pro or con, on the morality or the legality of her act.

4. Prior to her remarriage, she had been the recipient of some or all of the pay and allowances of my son who was her husband. When she remarried, I am informed, the

Department of the Navy, under authority of the Missing Persons Act, concluded that the ex-wife was no longer a dependant of the MIA and terminated her receipt of pay and allowances on the apparent assumption that her new husband would assume the obligation of attending to her financial requirements. Thereafter, the said pay and allowances were accumulated in a bank account maintained by the Department of Defense for the benefit of my son. The funds accumulated in that bank account and other funds which would become available in the event of a determination of death under the Missing Persons Act, became quite considerable. My son's wife, having been designated by him as his beneficiary, was the person who, ultimately, would receive these assets if a determination of death were made.

5. I am informed that my son's wife's remarriage was less than a financial success and that she and her new husband were in need of funds. Consequently, I believe in late 1973 or early 1974, she requested a determination of death -- for the apparent purpose of obtaining the above described funds. I am further informed that in or about March, 1974, being impatient to obtain the determination of death, my son's wife sued the Secretary of the Navy in the United States District Court for the District of Columbia, seeking a judgment compelling him to proceed with the determination of death and that, thereafter, when that defendant assured the Court that status reviews would proceed in an orderly way, the action was dismissed. I am further informed that after the said dismissal, her attorney contacted the Government to inquire as to when the determination of death could be expected and that he was then informed that there

was a moratorium in determinations of death, except in the case of a request by a next-of-kin receiving governmental benefits. In or about March 1975, she filed a second action in the United States District Court for the District of Columbia (Civ. Action No. 75-353). When I was informed of this, I recognized the need to become involved in that lawsuit so that my son's interests could be protected.

6. I may point out that I am a retired businessman living now on somewhat limited income. A substantial part of my life's savings has already been spent on behalf of my son and the other MIA's. I was in no position to undertake the financial burden of involving myself in substantial Federal Court litigation. Fortunately, the other MIA families joined in the effort and we were able to obtain representation, both for me as a parent, and for the National League of Families of American Prisoners and Missing in Southeast Asia, by the attorney who also happens to be representing the plaintiffs in the present action.

7. We sought to intervene and to raise substantially the same issues as have been raised in the present action.

8. Before the intervention motion was heard, the attorney representing my son's former wife and counsel for the Government appear to have made a joint request to the Court to suspend matters for a period of time, since they believed they would have a development to report to the Court that would have a significant impact on the entire lawsuit. My son's former wife then obtained an annulment of her second marriage in California and simultaneously requested that the Department

of the Navy:

1) restore her standing as a dependent of her first husband (my son);

2) conduct a status review at her request, as a next-of-kin receiving governmental benefits; and

3) waive a hearing.

Needless to say, all three requests were immediately granted and the plaintiff and defendant were then able to report to Judge Bryant in the Federal District Court in Washington that the issues had been resolved, the case was moot, and that there was nothing that I should be allowed to intervene in. My son was declared dead in a proceeding where his rights were completely ignored.

9. Obviously, I was in no position to finance a separate lawsuit. Also, there was no point in making an application to the Military Record Correction Board, since such an application could only be made by my son's legal representative, and I understand that, in the Defense community, that means his wife. Since she has now collected all of his money and gone her way, it is inconceivable that she would seek to undo the injustice that was committed. This is especially true in view of the fact that, I am informed, if the Defense Department had to rescind the determination of death and restore distributed monies, it could simultaneously obtain a judgment against her for the monies which had been distributed to her.

10. So, to suggest that I can go to the Court of Claims or to the Record Correction Board for relief of the injustice done to my son, is to depart from reality The fact of the matter is that the only way I can ever get relief for him is through involvement in a class action such as this.

Class action relief, I understand, is available in the Federal District Court and is not available in the Court of Claims. To recommend that I go to the Court of Claims or to the Record Correction Board is to suggest that I forget about an effective remedy for the wrong done to my son.

WHEREFORE, I respectfully request that the Court deny defendants' various alternative motions for dismissal, that it open up discovery in this action so that relief can be realistically pursued, and that it give the plaintiffs ample opportunity to undo, in an orderly and thorough way, the injustices which have been and are being done to MIA's.

RUSSELL DAVIS, JR.

Sworn to before me this
day of November, 1977.

AFFIDAVIT OF MARY K. BOSILJEVAC

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

---------------------------------------x

EARL P. HOPPER, JR., etc. et al.,
Plaintiffs,

-against-

JAMES E. CARTER, JR., etc. et al.,
Defendants.

---------------------------------------x

77 Civ. 1793 (JBW)

AFFIDAVIT

STATE OF NEBRASKA)
: SS.:
COUNTY OF SARPY)

MARY K. BOSILJEVAC, being duly sworn, deposes and says:

1. On September 19, 1977, I testified as a witness in an evidentiary hearing in this action on plaintiffs' motion for a preliminary injunction and defendants' motion for dimissal. Some time prior to that hearing, I had requested a copy of the "file" maintained by the United States Air Force respecting my husband, Michael J. Bosiljevac, an Air Force officer missing in action in Southeast Asia and one of the plaintiffs in this action. The 2-volume "file" which I received, which was alleged to be "complete", was marked in evidence as Exhibits 11A and B (see hearing transcript, p. 59).

2. At page 105 of the hearing transcript, the Government was permitted by the Court to substitute its

copy of the said "file" as Exhibit 11A and B so that I could keep my copy. While the transcript does not reflect who actually requested this substitution, my recollection is that it was made by the Government. It certainly was not made by me.

3. During the hearing, there was considerable testimony about the multitude of different "files" which different persons or entities in Government maintain on any given MIA and the discrepancies regularly found among them. Among these are many "files" of undisclosed materials, including a "DIA file" on my husband, the existence of which I had only recently learned.

4. This led the Court to direct the defendants to produce the "DIA file" for _in camera_ inspection and comparison with Exhibit 11A and B to see if substantial information in the "DIA file" had not been disclosed in the "open file". At page 416 of the hearing transcript, the Court is quoted as stating that the _in camera_ inspection and comparison had been made and that it revealed that there "is nothing in that material which in any respect that the Court can determine, adds to the information already in the file open to the parties in this action", except for "material with respect to sources which I saw that I believe the Government properly classified".

5. During the hearing, I had testified that I had a pending request under the Privacy Act for a copy of this "DIA file" and that I expected to receive it shortly.

I have now received a copy of the "DIA file" and have had an opportunity to compare it with a copy or version of the "open file", which I have, and which was the original document marked as Exhibit 11A and B (though later substituted for a government-supplied copy or version which the Court used for its comparison).

6. I have found several highly significant discrepancies between my "open file" and my "DIA file" which relate to much more than mere "sources".

7. At pages 60-65 of the hearing transcript, I testified about a foreign broadcast interception report respecting my husband which the Air Force tried to deny having and which they eventually were forced to concede existed. That is one of the only two foreign broadcast interception reports that ever got into my "open file".

8. Now, my "DIA file" has an interception report on a third broadcast from Hanoi Radio ("Okinawa #2 915482 - September '72") which not only relates to my husband, but has details which do not coincide with the other two reports in the "open file".

9. It is perfectly obvious now that, when the Air Force resisted disclosure of the first and second broadcast reports and finally released them (or some of it) in August 1973 (see Exhibit 13 marked in evidence during the hearing), the third broadcast report, dated in September 1972, was withheld. At this point, I am not willing to accept an explanation of this in terms of "oops! - another unfortunate mistake".

10. In addition, my "DIA file" contains references to documents which were withheld and forwarded for clearance to "Headquarters JCRC" and "Headquarters PACAF (att.: DOOF)". I can find nothing in my "open file" that can be correlated with these, and, so far, I have not had a satisfactory response from JCRC or PACAF regarding the inventory and contents of the documents sent to them for declassification. However, I have received partial responses which indicate still further "files" which I had never been told about before.

11. Much of the material in the "DIA file", derived from the computerized readout on my husband's case, is unintelligible without clarification - even to me after years of dealing with this type of material. When such clarification takes place, I rather expect that it will not dovetail with my "open file".

12. Finally, unless most of what I have been told by the Air Force during the last five (5) years was untrue, the photograph in my "DIA file" is a picture of the wrong crash site.

13. Apart from the general shoddiness of this whole situation, I mention these discrepancies between my "open file" and my "DIA file" because they seem to be totally irreconcilable with the Court's statement, at page 416 of the hearing transcript, that such inconsistencies were not found in the copies or versions of these documents which it examined.

14. I wish to make it clear that, both on the basis of my own observations and what I have been told by others, I am not questioning either the intelligence or the integrity of the Court. That, however, does not dispose of the problem, or explain it.

15. After long and careful consideration, I can offer only two possible explanations of why the Court could not find the discrepancies in the "files". The first possibility is that the "open file" and the "DIA file", which the Court examined, are materially different from the "open file" and the "DIA file" with which I have been supplied. If this is true, it would seem to imply either that when Exhibit 11A and B was replaced by a copy supplied by the Government so that I could retain possession of documents that are "precious" to me (hearing transcript, page 105) there may have been a material substitution of documents, or that we are involved with different and inconsistent "DIA files". A comparison of the relevant documents could clear this up - expecially now that, with Privacy Act disclosures, the Government seems to be less preoccupied with secrecy.

16. The second possible explanation arises from the way in which the examination and comparison was made by the Court. This all took place during the mid-day luncheon break of no more than a few hours on September 24, during which time, I understand, the Court attended to some other case or cases. It will be recalled that the "open file" is really voluminous. The "DIA file", which I received, is not as large, but its contents are substantial and, at places, indistinct and difficult to read. It is asking a lot of anyone, no matter how honest or how bright, to absorb and analyze all of this material with confidence in so short a time and under these circumstances.

17. And, even if the Court had an adequate opportuntiy to examine these documents really exhaustively, I question whether it could have or would have done so in the same way and, from the same perspective as someone such as a MIA family member who feels the strongest motivation to get at all of the facts.

18. It is because MIA family members have been motivated to develop the expertise that many of us now have in recognizing the significance of details such as these, that substantial withheld information can be extracted from the Government and steps in the direction of reasonable disclosure can be sought which,, if achieved, may ultimately make possible some kind of representation of the interests of men such as my husband. I do not expect that degree of skill in this specialized area from a Court which has not had prolonged and intensive exposure to the problems involved. With reasonable discovery, we believe we could do much more.

19. Whatever the reason, it seems clear that something went very wrong with the examination and comparison of these documents and that is a matter of such basic importance to this litigation that it requires clarification and correction in the record.

20. I understand the whole matter may now be coming up for reconsideration by or relitigation before the Court, and I am submitting this affidavit in the

respectful hope and expectation that the Court will be assisted at that time.

MARY K. BOSILJEVAC

Sworn to before me this
day of November, 1977.

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss..

RICHARD MARVAS, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 127 SECOND AVE. NEW YORK, N.Y.

That on the 30 day of DECEMBER, 1977, deponent personally served the within JOINT APPENDIX VOLUME II OF II upon the attorneys designated below who represent the indicated parties in this action and at the addresses below stated which are those that have been designated by said attorneys for that purpose.

By leaving 1 true cop~~ies~~y of same with a duly authorized person at their designated office.

~~By depositing _____ true copies of same enclosed in a postpaid properly addressed wrapper, in the post office or official depository under the exclusive care and custody of the United States post office department within the State of New York.~~

Names of attorneys served, together with the names of the clients represented and the attorneys' designated addresses.

DAVID G. TRAGER
United States Attorney, Eastern District of New York
Attorney for Defendants-Appellees
225 Cadman Plaza East
Brooklyn, New York 11201

Richard Marvas

Sworn to before me this
30 day of December, 1977

Michael DeSantis

MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0230908
Qualified in Queens County
Commission Expires March 30, 1979